CONTAMINATED SITES MANAGEMENT IN THE PROVINCE OF BRITISH COLUMBIA:

A REVIEW OF PROVINCIAL ROLES AND RESPONSIBILITIES

A Report Prepared for the the Waste Management Branch
Ministry of Environment
Province of British Columbia

February 1990

91-03034/

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EXECUTIVE SUMMARY

Introduction

The recent passage of the B.C. Special Waste Regulation provides the Ministry of the Environment with stringent control over the management of toxic chemicals contained in routinely generated wastes. The Regulation also provides controls on the disposal of materials generated from the cleanup of contaminated sites.

However, strict legislative control of toxic pollutants is relatively new. While routine "end-of-the-pipe" waste discharges have come under increasing scrutiny and regulation over the last decade, there is an historical lack of legislation regulating two other types of occurrences which have led to the historical contamination of industrial sites with toxic chemicals:

a) control of trace discharges to land from drips, spills and other non-routine releases of chemicals (as opposed to routine process discharges), and
b) control of land disposal (i.e. "dumping) of toxic chemicals through burial of wastes at industrial sites or in remote or uncontrolled locations.

Project overview

Site redevelopments have increased the urgency of establishing objectives for contaminated sites management in British Columbia, and reflecting these objectives in provincial legislation. The Provincial Ministry of Environment initiated the current review of the existing regulatory framework for managing contaminated sites with a view to defining their roles and responsibilities, and identifying appropriate procedures for the management of contaminated sites. This report is expected to serve as the basis for revisions to existing legislation related to contaminated sites management.

Information and data were gathered from personal interviews of officials of the provincial and municipal governments. Consulted organizations included:

- numerous staff in the Ministry of the Environment
- the Development Service Branch, Ministry of Municipal Affairs, Recreation and Culture
- Three municipalities with specific experience in the area of site redevelopment involving contaminated sites:
  - ◊ The Corporation of the District of Burnaby (Env. Health Division)

  - ◊ The Corporation of the Township of Richmond (Richmond Health Department)
  - ◊ The City of Vancouver (the ad hoc Hazardous Soils Committee)
- The Union of B.C. Municipalities.

Environmental legislation and regulations and other sources of legislative authority, principles of common law, case law, and a variety of reports and documents were reviewed. A survey of legislative approaches used in other jurisdictions was also conducted.

Legislative authority and administrative arrangements regarding the management of contaminated sites are described. This background information provides the basis for an identification and analysis of the issues and problems associated with the current regulatory framework, and for formulating conclusions and recommendations.

The Current Legislative Structure

The Province does have jurisdiction over the management of contaminated sites in the province, but some legitimate roles and responsibilities are not currently fulfilled. Many of the problems arise out a variety of faults with the regulatory framework, lack of agreement on administrative arrangements, and current resource constraints.

There is no specific legislative authority for municipalities to act in managing the assessment and remediation of contaminated sites. As a consequence, municipalities generally refer owners of sites to the Ministry for clarification of the status of the site respecting contamination. Municipalities have the ability to force such referrals by withholding the various municipal approvals which are required for the development of lands.

The authority of the Ministry of the Environment to act in instances of site contamination derives principally from the Waste Management Act and regulations such as the Special Waste Regulation under the Act, and the Environment Management Act. The scope of the Ministry's authority under this scheme is inadequate in terms of dealing with historical contaminated sites. Current legislation does not capture all types of contaminated sites for consideration, nor does the Ministry have the authority to require routine assessment and remediation of sites in the absence of an apparent or possible release or discharge of contamination to the environment. Moreover, the Ministry has no authority to initiate cleanup action and recover costs unless the situation can be characterized as an "environmental emergency".

Problems with the Current Regime

Although the Ministry has established operational procedures for managing the assessment and remediation of contaminated sites, several key elements of the process need to be clarified or improved. Principles for reform emerged from the review and analysis of each problem area. These include:

1. The role of the Ministry as the lead agency should be clearly established.
2. The overall accepted process for managing sites should be clearly communicated to all parties.
3. Clear and consistent standards for judging site contamination and remediation should be published by the Ministry.
4. High priority sites should be routinely reviewed for possible contamination. Disclosure of information about such sites should be mandatory.
5. The role and co-ordinated interaction of other agencies should be clearly defined.
6. Requirements for public notice and public involvement should be established.
7. A co-ordinated and centralized site information database should be established.
8. Acceptable facilities for disposal of contaminated soils should be established.
9. The Ministry should be provided with authority to certify that sites have been remediated in compliance with existing provincial standards.
10. The Ministry should be provided with authority to deal with issues of cost assignment for assessment and remediation activities.

During the course of this study, a fairly clear concensus[1] emerged regarding the appropriate role of the Province in these matters. It was generally felt that the management of contaminated sites should be the responsibility of the Ministry of Environment, and that the Ministry should take the lead role in determining both the process and the standards governing site assessment and remediation. It was also felt that the process should be sufficiently flexible to permit local governments to play a strong role in the process where this arrangement was mutually agreed to.

The Province therefore has a clear interest in providing its officials with clear authority to take action in appropriate circumstances. The required changes can be accomplished through amendment to existing legislation, principally the Waste

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[1] The project team consulted with municipal public officials in City of Vancouver, Richmond and Burnaby, as well as various provincial officials. The word 'concensus' refers to the views of individuals consulted.

Management Act, and the development of appropriate regulations under the Act. The Waste Management Act provides a suitable framework for providing a comprehensive and effective contaminated sites management process.

Proposed Changes for Managing Contaminated Sites

Our proposals respecting changes to the existing regulatory framework for managing contaminated sites focus on the following four areas:

- broadening the scope of authority under the Waste Management Act,
- enabling delegation of authority by the Ministry,
- setting out mandatory duties and requirements, and
- strengthening enforcement provisions.

These changes are summarized in Table 1.1 and briefly discussed below.

Scope of authority

Our first proposal respecting needed changes to the current regulatory framework relates to broadening the existing authority of the Ministry to deal with historically contaminated sites. We have proposed providing the authority to conduct mandatory reviews of certain high priority categories of suspect sites including sites of "industrial establishments". We also propose discretionary authority to conduct site assessments where an official 'discovers' a potential contaminated site. Changes to the provincial Waste Management Act will be required to provide the authority in these areas.

Enabling delegation

Our second proposal relates to the way in which provincial requirements respecting assessment and remediation are delivered. We feel that the Ministry should take the lead role in establishing the basic process and standards governing soil remediation. Nevertheless, the management process should also have the flexibility to permit local governments to assume the lead role in implementing these requirements where such an arrangement is mutually agreed upon. Changes to the Waste Management Act are required to permit the delegation of this function to local government officials. Changes may also be required to the Municipal Act, and in cases like the City of Vancouver to the Vancouver Charter, to permit local officials to exercise this delegated authority.

TABLE 1.1: Proposed Changes to the Regulatory Framework	
1. Broaden the Scope of Legislative Authority under the Waste Management Act	
	Comments
a. Enable routine review of designated types of sites • enable routine review of sites of high priority sites • enable certification of compliance with established standards for assessment and remediation • enable statutory restrictions on the future land use of uncertified property	The Ministry should define criteria for "high priority sites" "Industrial establishments" must be specifically defined for guidance (e.g., by listing selected S.I.C. numbers) The Ministry should establish a contaminated sites database The Ministry should publish "Criteria for Managing Contaminated Sites in B.C."
b. Create Authority to Require Assessment and Remediation • provide discretionary authority to order assessment and remediation (conditional on a reasonable belief that the site is contaminated and poses a potential hazard or risk to human health or the environment)	
2. Enable Delegation of Authority	
The Ministry plays the lead role in the site management process • enable delegation of the lead role in the management process to municipalities (where mutually agreed) • authorize "an official designated by the Minister" to grant all approvals and certifications • Functions of the Ministry not to be delegated include: ◊ establishing the basic site management process ◊ defining standards of assessment and remediation ◊ enforcement	The Ministry should develop guidelines for qualifications and responsibilities of delegated officials and the form of the delegation agreement.
3. Set Out Mandatory Duties and Requirements in Legislation	
• stipulate the legal obligations imposed on owners and operators of sites routinely assessed (item 1a): ◊ disclosure and submission of information ◊ preparation of a public communications strategy ◊ preparation of the all required assessments ◊ development and implementation of a remediation plan, and ◊ submision of a final report demonstrating compliance • provide a legal mandate to government officials to take required decisions and actions including: ◊ issuing letters of non-applicability ◊ approving assessments and remediation plans ◊ issuing certification of compliance • provide the authority to make approvals and/or certification conditional on posting financial guarantees, monitoring plans or other measures to ensure the long term care and maintenance of the site.	The Ministry should establish minimum requirements for public consultation and develop policy and guidelines for public communications plans.
4. Strengthen Enforcement Provisions	
a. Orders to take action • authorize the Minister to order specified action (to assess and/or remediate) when: ◊ the necessary approvals and certification are not obtained ◊ a suspect site is discovered by officials • enable issuance of Orders to present and past owners and operators of sites	The Ministry should establish fines and penalties.
b. Statuatory assigument of costs • authorize direct action by the Ministry to rehabilitate a site in default of an Order • authorize the Minister to recover reasonable costs involved the clean-up • assign civil liability on the basis of strict liability • authorize the government to assume costs • allow discretion of the Ministry to offer partial contribution of costs	Strict liability imposes civil liability on: ◊ past owners who knew of the existence of the site and failed to disclose it to the purchaser, and ◊ current owners who fail to exercise all due diligence ascertain the existence of contamination on the site and to prevent the release of a hazardous substance. The Ministry should develop specific policy/guidelines for the use of public funds in site cleanups.
d. Funding of "orphan sites" • The proposed changes are consistent with the Canadian Council of Resource and Environment Ministers (CCREM) proposal to provide a national contingency fund to clean-up "orphan sites". • enable use of the provincial contingency fund for rehabilitation of orphan sites.	An orphan site is described as a site where a responsible party cannot be identified, or is known or pursued by the law, is unable to pay the required rehabilitation costs and which pose a serious threat to public health or the environment.
e. Additional enforcement provisions for consideration • hold officers of corporations personally liable • provide for compensation to adjacent property owners for costs and expenses associated with clean-up and loss/damages (including loss of property value) attributable to physical damage of their property. • provide the authority to obtain an injunction against parties where the necessary approvals are not obtained prior to development. • establish substantial penalties for falsifying information or evading requirements at any stage in the process.	The Ministry should develop criteria for applicable properties. The Ministry should establish fines and penalties.

Mandatory duties and requirements

Our third set of proposed changes to the existing regulatory framework relate to the actual process leading up to the certification issued by the Ministry. At various stages in the process, the owner or developer of the property should be under certain obligations to provide information and conduct certain activities. Decisions have to be made by government officials at different stages in the assessment and remediation process. Enabling legislation is required to clarify the legal obligations imposed on owners and operators of sites, and to provide a legal mandate to government officials to issue the necessary approvals and certifications required throughout the process.

Strengthening enforcement provisions

Our fourth set of recommendations respecting needed changes to the legislative scheme relate to the need to provide an effective means of enforcing provincial requirements in relation to historically contaminated sites. As a first step in dealing with non-compliance the Province should have the authority to order specified parties to take the certain specified action. Under this scheme, orders could be issued to current owners or operators of a site as well as past owners and operators at the time of the release or disposal of the substances which contaminate the site. We feel that because the first priority of the process should be on cleaning up the site, current owners or operators of the site should be required to comply with all Ministry requirements to remediate the site, particularly where a change of use is contemplated. Defaulting on a Ministerial Order should expose the parties receiving the order to possible prosecution under the Act. Expansion of the current authority provided in section 22 of the Waste Management Act should be considered.

Defaulting on an order issued by the Minister should have another important implication. The new scheme should permit the Ministry to take direct action to assess and remediate the site and to recover the cost of carrying out the action against the responsible party.

We have recommended that recovery of these costs should on the basis of strict liability for all remedial costs and all natural resource damages. In this way past owners will be liable for clean-up costs where they know of the existence of the contamination and did not exercise all due diligence in the long term care and maintenance of the site. Our proposal also imposes civil liability on current owners who fail to exercise all due diligence to prevent the release of a hazardous substance. However there may be circumstances under which the current owner or operator of contaminated property should be entitled to seek indemnification from the government. This may arise where the party complying with the order is not the "author of the environmental problem" and where no notion of fault or lack of care can be attributed to his behavior in connection with the site, and where in these circumstances the responsible party cannot be identified or is unable to pay.

In these situations the Province will be required to pay all or a portion of the costs of remediation where a 'responsible party ' cannot be found, or where imposing the entire costs of remediation on the responsible party is inappropriate in light of the party's ability to pay.

A number of options for funding Provincial responsibilities in this area are available. We favour setting up a contingency fund similar to that set out in section 33.1 of the Waste Management Act. This option offers the Ministry more flexibility in terms of dealing with the wide variety of historically contaminated sites that it will encounter, and is also consistent with the existing approach to dealing with the decommissioning of active sites. Amendments to section 33.1 would be required to provide the authority to access the fund for these purposes.

Enforcement of provincial requirements would also be enhanced by a number of other provisions, including lien provisions to facilitate collection of government moneys expended in clean-up, increased penalties for failure to report releases of contaminants and for falsifying information submitted to government officials, injunctive relief, and court orders. The legislation should also provide a mechanism or process for dealing with the question of compensation to adjacent property owners for costs and expenses associated with clean-up and loss/damages (might include loss of property value) attributable to physical damage of their property.

PREFACE

The Ministry of Environment has substantial authority to deal with hazardous waste disposal and related matters. However, concerns have emerged regarding the extent of regulatory controls placed on historically contaminated sites. Redevelopment of these sites may pose a threat to public health and safety and environmental quality, and increases the urgency of managing contaminated sites in an appropriate manner.

The Ministry of Environment is being asked to assume an increasingly important role in the management of contaminated sites. Waste Management Branch officials are now facing problems arising from the legal basis for these activities. Consequently, the Ministry wishes to review the need for new legislative controls in this area, and survey the types of legislation and regulatory authority possible and appropriate for effective management of contaminated sites in British Columbia.

This report describes a possible approach to solving the current problems associated with the management of contaminated sites. The report concentrates on the role and mandate of the Ministry of Environment, outlining various technical, legal and administrative improvements to the existing regulatory scheme.

Principal investigators in this project were Ms. Lynne Huestis, consultant, and Dr. Frank Henning and Dr. Dennis Konasewich, principals of Envirochem Services. Research on the legal aspects of the study was conducted under the general direction of Dr. Andrew R. Thompson, Associate Counsel at the law firm of Ferguson Gifford. Additional research assistance was provided by Stephen Perks, a lawyer in private practice, and Nancy Morgan, a lawyer with Ferguson Gifford. Dr. John Wiens, Head, of the Contaminated Sites Unit, Environmental Safety Program at the Ministry of Environment was the project authority for this study.

Chapter 1:

INTRODUCTION

Contaminated sites can originate in a number of ways. Most frequently, the source of contamination results from releases of chemicals from industrial or commercial operations on the site, although it can also result from unknowingly filling sites with contaminated soil from elsewhere, illegal dumping , and in some cases from high background or natural levels of soil contamination. A wide variety of on-site activities can result in soil contamination, including:

- process discharges to land or water,
- on-site burial of wastes,
- non-point chemical releases (small, frequent drips and spills),
- stockpiling and storage of materials,
- major spills, and
- releases during fires.

The degree of contamination is usually a function of the nature of the contaminant and the amount of contaminating material stored or disposed of on the property.

Redevelopment of former industrial sites or other sites where there is contamination raises numerous difficult and often controversial technical and legal questions. Many historically contaminated sites come to light as a result of intended changes in land use. The process of developing the site provides an opportunity to recognize and scrutinize sites which may hold historical contamination. Especially problematic, however, are sites which have already been developed extensively where contamination is possible but unconfirmed. The difficulties of assessing such sites are extreme, as are the consequences of remediation in the event that serious and threatening contamination is discovered. Looking at the legal issues, the nature and extent of liability of the Ministry of Environment and of local governments and their officials, pertaining to inspections and the various forms of approval which might be requested and given relating to property development where health risks and environmental impairment may be involved, is also of concern.

Site redevelopments have increased the urgency of establishing objectives for contaminated site management in British Columbia, and reflecting these objectives in provincial legislation. This study is intended to address proposals to deal with contaminated sites which fall outside the scope of current provincial legislation.

Consequently, the focus of our review and resulting recommendations is on those sites where historical activities on the site have resulted in contaminated soil conditions. This largely involves sites where the activity on the site has since ceased or changed over time, as opposed to contamination from current industrial activity which is regulated under the existing regulatory scheme.

Chapter 2 identifies the various concerns and issues raised during the course of this study, and provides the basis for our recommendations regarding a process and supporting legislation to manage contaminated sites in the province of British Columbia. The Chapter looks at the scope of legislative authority, the process for assessment and remediation, and looks at the concerns respecting assignment of costs for clean-up. The process of formulating conclusions and recommendations also involved considerable consultation and discussion with various officials at both the provincial and municipal level, in the form of meetings with individuals and an informal workshop held in Victoria.

The terms of reference for this study directed us to provide a general overview of provincial roles and jurisdiction in the management of contaminated sites in the province of B.C. This information provides much of the background to the analysis found in Chapter 2, and can be found in Appendix A. The extent and distribution of existing legislative authority is reviewed, together with the distribution of existing administrative responsibilities between provincial and local governments. Data for this section of the report were gathered in a personal interview survey of officials of the provincial government, and of three municipalities - City of Vancouver, Richmond, and Burnaby. Additional information was provided from a review of relevant statutory authorities and case law, as well as texts, reports and analyses on the subject.

Concerns respecting the nature and extent of liability of government officials with responsibilities for the management of contaminated sites arise in many cases. A review of the principles governing government liability is presented in Appendix B. Additional material concerning the common law principles governing liability for the costs of clean-up are provided in Appendix C. Both these Appendices support the more general observations about liability which appear throughout Chapter 2.

The terms of reference also call for a comparative review of legislative approaches to management of contaminated sites in other jurisdictions. Appendix D looks at the legislation of the United States and the Netherlands, and closer to home the approaches utilized by Ontario and Quebec. The object of the review is to identify trends in other jurisdictions respecting the management of contaminated sites, and where possible highlight possible alternative approaches to that currently being used in B.C. Reference to these trends can be found in Chapters 2 and 3.

Our conclusions and recommendations are presented in Chapter 3. Some general conclusions are described first, followed by specific recommendations on a proposed process and supporting legislation for managing contaminated sites in British Columbia. Our recommendations reflect technical, legal and administrative consideration, and outline any phase-in requirements for the proposed scheme. The terms of reference directed us to be fairly prescriptive in terms of the proposed process and regulatory framework, and our recommendations reflect this direction.

Chapter 2:

Managing Contaminated Sites in B.C. - A Review of the Issues Surrounding the Current Regulatory Regime

The B.C. Waste Management Act, S.B.C. 1982, c.41, and regulations have undergone a number of important changes in recent years. In April of 1988 the Special Waste Regulation, B.C. Reg. 63/88, came into effect, defining special wastes and providing stringent controls over the management of chemicals contained in routinely generated wastes. The Regulation also provides controls on the disposal of materials generated from the closure and clean-up of special waste facilities. However, many aspects of the current regulatory scheme do not apply or are not appropriate for managing historically contaminated sites.

Site redevelopments have focused concern on the limited nature of regulatory controls over sites where historical activity on the site has resulted in soil contamination. All parties involved in the process express general concern over:

- the limited scope of legislative controls in this area,
- the absence of a well defined process and criteria for site assessment and remediation, and
- the potentially broad basis of liability for clean-up of toxic real estate.

This chapter looks at these three broad areas of concern, examining the various issues raised and looking at the manner in which these questions are handled in other jurisdictions.

Scope of Legislative Authority

Many environmental statutes dealing with contaminated sites across Canada and in the United States include notification requirements, may require clean-up and remediation of property and impose civil and quasi-criminal liability for pollution emanating from property. They may also restrict development and future uses of the land.

In British Columbia, the Waste Management Act currently provides the primary authority to deal with contaminated sites in the province. The Ministry also relies on the Environment Management Act for authority in this area. A full review of the authority found in these statutes can be found in Appendix A. At present, the authority of the Ministry of Environment to manage historically contaminated sites is limited.

1. General Authority over Clean-up and Remediation

The Waste Management Act, and its predecessor the Pollution Control Act, was initially directed at controlling process discharges through the issuance of permits. While routine "end-of-the-pipe" discharges have come under increasing scrutiny and regulation over the last decade, there is a historical lack of legislation controlling trace discharges to land from non-point sources, such as spills or drips of preservative from treated wood, and controlling land disposal of toxic chemicals through burial of wastes at industrial sites or in remote or uncontrolled locations.

The authority of the Ministry of the Environment to act in instances of site contamination is determined by the nature of the contaminant involved as well as by the site-specific circumstances of the contaminated media. The authority of the Ministry is essentially limited to situations involving:

- special wastes,
- process discharges, and
- emergencies which threaten the public health or environment.

Provincial legislation does not include duties to initiate or undertake remedial action in circumstances involving property contaminated by historical use of the site.

In B.C., soil with properties qualifying it as a special waste must be dealt with in accordance with the very strict requirements set out in the Waste Management Act. These sites must be registered as special waste even before excavation, and disposal options are closely regulated. It should be noted however that a historical special waste contaminated site is not a special waste facility with the accompanying special restrictions and requirements unless part of the remediation plan for the site calls for on site treatment of the special wastes.

Where the contaminated soil can not be classified as a special waste under the Act, the legislative scheme imposes no special requirements or duties on persons connected with the land in question. In these situations the general provisions of the Waste Management Act prevail. It is arguable that where the proposed remedial work involves the introduction of waste to the environment, contrary to section 3 of the Waste Management Act, the province has the authority to require the developer obtain a permit or approval prior to commencing the proposed clean-up[2]. Some soil cleaning processes result in discharges to air and water. On site disposal would also require approval to establish a waste disposal site.

As a result, where a developer proposes to conduct remedial work on a site prior to commencing the development, the province may have the authority to approve the proposed remedial plan where there is a risk of a discharge occurring, or where disposal of the contaminated soil is required.

The problem for the Ministry occurs where knowledge about the site is limited. The Ministry has very limited authority to require persons connected with the land to conduct a preliminary assessment of land suspected to be contaminated. In the absence of information about the exact nature and extent of contamination, the ability of the Ministry to order persons connected with the land to conduct the necessary assessment and remedial work may be limited. The power to prevent a spill, found in section 10 of the Waste Management Act, and the power to abate pollution, found in section 22 of the Act, both presuppose some knowledge about the nature of the problem on the part of the Ministry. Ministerial orders under section 10 are available where the Minister "considers it reasonable and necessary to lessen the risk of an escape or spill" of a polluting substance; a "polluting substance" refers to a substance that could "in the opinion of the Minister, substantially impair the usefulness of land, water or air if it were to escape..." Orders under section 22 are available "where a manager is satisfied on reasonable grounds that a substance is causing pollution".

Sections 10 and 22 of the Waste Management Act suggest that a site should be assumed clean unless the contamination is obvious, or the potential risk imposed by the contaminant is known. The legislative scheme does not currently support the assumption that a site, once occupied by industry, is contaminated unless proven not to be. Determining whether a site is contaminated or not, and how to manage any contamination that is found, requires an assessment of the property in order to evaluate the risks presented by the site.

Site redevelopments have focused concern on the limited nature of regulatory controls over sites where historical activity on the site has resulted in soil contamination, but there is no apparent release or discharge of the contaminant to the local environment. Where there is imminent danger to the public health or environment, the B.C.

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[2] In setting out the terms and conditions attaching to a permit in these cases, the Ministry primarily relies on the guidelines developed for the Pacific Place lands. The Pacific Place Standards establishes Level C cleanup criteria for proposed commercial and industrial uses, and Level B criteria for residential and recreational uses.

Environment Management Act provides a mechanism for the Ministry to force assessment and remedial action. However, historical contamination which is static on a site falls outside the scope of all current provincial legislation, unless special waste levels are present. In such cases, the Ministry of Environment cannot force investigative action to determine the presence and nature of site contamination.

2. Disclosure

While the provincial scheme does require the reporting of a spill of a "polluting substance" under section 10(5) of the Waste Management Act, provincial legislation imposes no general duties regarding the disclosure of hazardous or potentially hazardous substances, unless the substance qualifies as a special waste. Section 43 of the Special Waste Regulation requires registration of specified volumes of special wastes.

Three jurisdictions in Canada currently impose vendor disclosure requirements regarding underground storage tanks.[3] Under these statutes, the owner of property, upon sale or lease of the property, is required to disclose to a prospective purchaser or lessee the existence of underground storage tanks. The owner must also provide the purchaser with proof that the tanks comply with certain regulatory provisions. No similar provisions exist in British Columbia.

3. Notice of Contamination

Under the provincial Land Title Act the provincial waste management director has the discretionary authority to file a notice of contamination of land, where a person entering or using the land is exposed to a danger to health, against land registered in the land title office.[4] It should be noted that such notices are limited to contamination by "special waste" as defined under the Waste Management Act, and to situations where there is a danger to health.

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[3] See in this regard: Ontario's Gasoline Handling Act; New Brunswick's Petroleum Storage and Handling Regulation; and the Yukon's Gasoline Handling Act.

[4] See section 320.1(2). Section 320.1(3) provides that the notice shall specify the nature of the contamination and shall state the estimated period that the danger will persist. Where the director is satisfied that the danger no longer exists, he can notify the Registrar who can then cancel the endorsement made on title.

4. Restrictions on Development and Use

Provincial legislation does not place any restrictions or conditions on future use of land used to dispose of waste. Ontario is the sole jurisdiction in Canada which restricts the further use of contaminated lands. A review of these provisions can be found in Appendix D.

Restrictions on development and use in British Columbia occur at the municipal level. The scope of municipal authority to control land use is outlined in Appendix A.

The nature and extent of liability of the Ministry of Environment and of local governments and their officials, pertaining to inspections and the various forms of approval which might be requested and given relating to property development where health risks and environmental impairment may be involved, is of particular concern.

Local governments have expressed concern over their authority to withhold various approvals and permits where a site cannot be developed without unacceptable risk to public health or to the environment, or to require assessment and remediation as a condition of approval.[5] While it is beyond the scope of this report to identify deficiencies in this area, it should be noted that in many areas local governments have a broad range of discretion to refuse to grant approvals or permits.

The common law provides significant and sufficient protection to local governments where, subsequent to the approval of development of the site, an unforeseen hazard such as toxic waste is discovered.[6] Unless the official acted recklessly or negligently in approving a site for development, it is unlikely they would be held liable.[7] The principles governing government liability in this area have been canvassed and are set out in Appendix B.

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[5] The scope of municipal authority in this regard has been described in Appendix A.

[6] In the past few years, the trend has been for the Province to enact legislation to reduce the liability of local governments. In particular, section 755.1, 755.2 and 755.3 of the Municipal Act have the effect of limiting liability of municipal public officers or the municipality in general. Any proposal to limit the liability of local government and approving officers for negligence with respect to the approval of sites where subsequent to the approval an unforeseen hazard such as toxic waste is discovered, might be consistent with the current trend of government policy. However, the above noted provisions have not been tested by the courts and it is unclear as to the effect of protection from liability created by these provisions. For a more complete discussion, see Appendix B.

[7] If they granted their approval without any knowledge of the hazards then it is unlikely they would be held, at common law, negligent. However, if they had knowledge

5. Approvals for Remedial Action

Where assessment and remediation is required, the municipalities frequently refer suspect sites to the Ministry of Environment prior to granting the necessary approvals. Provincial officials are currently being asked to certify that lands are environmentally safe or suitable for a particular purpose.

Municipal referral of suspect sites places the Ministry in a difficult legal position. While the common law provides protection against liability where a discretion is exercised pursuant to a statutory authority and the exercise of the discretion is *bona fide*, it is not clear that the Ministry of Environment has authority to offer the required assurances respecting land status.

The Province does have the authority to approve an environmental assessment or the proposed plan of remediation where the excavation or soil cleaning process has the potential of causing effluent or emissions to be introduced to the environment. It is less clear whether the Ministry has authority to control remediation plans where the excavated material does not involve special wastes and is going to a permitted facility. Moreover, this authority to require a developer to seek approval or a permit prior to commencing cleanup in certain instances does not in any event extend to the certification of land status; the Ministry does not have the authority to issue a certification if a site does not need remediation, or if the completed remediation has rendered the site as suitable for development.

In particular, the Ministry exposes itself to liability where it issues a certification of land status which turned out to be in error. The result of issuing such a certification of land status may be to put the certifying official in a position of personal liability should such advice turn out to be inaccurate or incorrect.

Section 2(d) of the Environment Management Act does provide that the duties, powers and functions of the Minister extend to matters relating to the "provision of information to the public with respect to the quality and use of the environment". It is arguable that this provision was intended to cover information and advice relative to the environment generally and public health hazards as opposed to specific concerns or

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of the hazard or if they reasonably could have acquired the knowledge of the hazard then they could be held liable.

considerations related to a particular developer's use of land.

Without a specific statutory mandate to certify the environmental safety of land or its fitness for a particular use, any provincial officials that do so may not be able to rely on statutory protections such as that contained in section 13 of the Environment Management Act, or on the indemnity provisions of their employment contract. If the advice is given outside of the scope of their statutory mandate and employment responsibilities, then the certifying official is exposed to personal liability.

6. Post-Remediation Requirements

The closure of a special waste facility is subject to a number of special provisions under the Special Waste Regulations of the Waste Management Act. In particular, the owner of the facility is required to prepare a written closure plan and to seek approval of the plan from the Ministry. Under section 33.1 of the Waste Management Act, the owner of the facility is responsible for the long term care and maintenance of the facility and may be liable for the costs of environmental clean-up necessitated by inadequate closure of the facility. These provisions have limited application to historical special waste contaminated sites, since the site only becomes a facility as defined if works are installed and an on site treatment or storage facility is constructed.[8]

Under the current provincial scheme there is no restriction on the future use of lands used to dispose of waste, nor is there any requirement to register on title notice of the contamination or the fact that the site has been subject to remedial work. As indicated earlier, if special wastes are involved, the director can file notice of the contamination under section 320.1 of the Land Title Act.

The actual clean-up activities may be subject to financial guarantees respecting satisfactory completion of the proposed work. Sections 8(1)(b) and 9(2) of the Waste Management Act authorizes a manager to issue a permit or an approval to introduce waste into the environment or to store special waste subject to a number of requirements, and may in the permit "require the permittee to give security in the amount and form and subject to conditions the manager specifies". It is not clear that a permit or approval is required in every situation where off-site disposal of the contaminated soil is proposed; in many cases the completion of the proposed clean-up may effectively limit the Ministry's jurisdiction to require post remediation financial guarantees against future health and environmental risks posed by the site. In these situations, the Ministry may also be limited in its ability to require routine post-remediation monitoring of the site.

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[8] See section 1 and section 2(12)(c) of the Special Waste Regulation.

7. Enforcement - Orders to Take Action

Most jurisdictions provide for a variety of abatement and clean-up orders under their environmental legislation. In Canada, Ontario has the broadest array of powers in this regard. [9]

In B.C., the Ministry of Environment relies on two sections of the Waste Management Act to enforce their requirements respecting the assessment and remediation of contaminates sites.

Where there is a *risk* that a "polluting substance" will escape or spill, other than as authorized by a permit or approval, the Minister may order persons who have *possession, charge or control of any polluting substance* to take action to "prevent or abate an escape or spill of the substance". Required actions extend to both assessment and remediation of the particular problem.

Where the contaminated site is *causing pollution*, a pollution abatement order under section 22 of the Act may be issued to the person who had *possession, charge or control* of the substance *at the time* it escaped or was emitted, spilled, dumped, discharged, abandoned or introduced into the environment.

Both sections 10 and 22 expose current property owners to potential criminal liability for failure to comply with the provisions of the order. Under section 34(8), a person who defaults on an order under these sections is guilty of an offence and is liable to a penalty of up to $300,000 daily. Court orders requiring persons convicted of an offence to refrain or take action are not explicitly provided for. Moreover, where a party defaults on an order, the Ministry has no authority under the Waste Management Act to take action as required and recover its costs from the responsible parties. The Ministry does, however, have such authority for "environmental emergencies" defined under the Environment Management Act.

The B.C. courts have not hesitated to apply section 22 of the Waste Management Act, enacted in 1982, to past owners and operators of sites. In West Fraser Timber Co. Ltd. et al v. The Crown[10] the Supreme Court of British Columbia was clearly of the view that section 22 covers past owners so lng as it can be shown that they had "possession, charge or control" of the contaminant at the time of the spill, escape or emission that gave rise to the current problem. The case suggests that what constitutes compliance today may not stand up to more stringent requirements in the future.At issue was the liability of four different operators associated with the site over a period of sixteen years beginning in 1972 [11]to comply with the terms of a section 22 cleanup order issued in 1987 by the Ministry of Environment.

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[9] These powers have been outlined in Appendix D.

In the words of the Honorable Mr. Justice Lander on the question of retroactive application of section 22:

> "Under the new legislation, and particularly having regard to section 22:
> (1) there is no express provisions of retroactivity; but
> (2) the clear words of the section refer to "the person who had possession, charge and control of the substance at the time it escaped ... or was abandoned or introduced into the environment, or any other person who caused or authorized the pollution ...";
> (emphasis added)
> (3) there is no new obligation imposed which was not created by the 1967 legislation, which was in force at the time of this incident;
> (4) the intent of the legislation, including the amendments which included the clarification of the word "person", is clearly to protect the public; and to place the responsibility for pollution abatement and cleanup on those parties who caused the pollution or were in control of the problem material.
> (5) further, such amendments are in the nature of procedural clarification in view of the earlier legislation."

The court refused to set aside the order as against the four operators of the site on the grounds that:

> "Domtar was in control of said operations at the time of the initial spill and subsequent contamination in the effluent pond. West Fraser was involved in negotiations over the property, and subsequently assumed control over the property.... After the date of assuming control, West Fraser undertook the remedial backfilling, either as a temporary measure or as an attempt to abandon the material, and remained the recipient of Waste Management Branch communications regarding the contamination. Louisiana-Pacific had prior knowledge of the danger and existence of the contaminated material, but then caused the pollution to surface with its excavation activity."

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[10] An unreported judgement of the Supreme Court of British Columbia, dated November 18, 1988 (Vancouver Registry No. A882748).

[11] In separate proceedings the court found that the owner of the site, B.C. Railway Company, had no liability because of a total lack of knowledge of matters that were the subject of the order.

While it is clear from this case that past and present owners or occupiers of a contaminated site face potential statutory liability for failure to comply with a cleanup order issued under section 22, the limitations of this section should be kept in mind. The Ministry has authority to issue abatement orders under section 22 where a substance is causing pollution. The section has limited application in the situation where there is no active migration of contaminants from property.

There is also the issue as to the person who is in charge or control of land in which a polluting substance is migrating. If that person is not the person initially responsible for discharging the substance into the environment, it is unclear whether it is the intent of the legislature to make such a person responsible under section 22.

Another issue surrounding the scope of section 22 authority relates to the question of access. It would appear that while an order can be made against a person who is not an occupant or an owner of property upon which pollution is occurring, there is no specific statutory authority empowering a person who is subject to an order to enter upon private or public lands to comply with the order.

It should also be remembered that the Ministry does not have the power under the Waste Management Act to undertake remedial measures at the expense of parties in default of a section 22 order. Section 21 of the Waste Management Act allows an officer to enter upon lands for the purpose of investigating an alleged offence and to conduct tests and take away records relating to the alleged offence. The entry does not appear to allow an officer to take remedial measures to abate pollution.

The Assessment and Remediation Process

The absence of a defined overall process and criteria for contaminated sites management causes anxiety and confusion with most parties. Site owners and developers are concerned that agencies will become involved late in the process and stipulate new requirements. There is no clear mechanism for providing an appropriate balance of agency involvement for environmental assessment, public health assessment and site worker protection. Moreover, there is no mechanism for ensuring that site clean-up requirements are cost effective and reasonable in the face of public demands for stringent clean-up standards.

The uncertain and/or prolonged timing of the assessment and remediation process creates financial constraints and risks for developers. For example, financing may be contingent on development approvals, which may be contingent on satisfactory remediation. A developer may not be able to proceed with remediation until financing is assured.

Issues surrounding the existing process center on information about contaminated sites, on the standards governing the assessment and remediation process, and on the role of the various parties in the process.

1. Identification of Contaminated Sites

The lack of a central or accessible information base for sites is viewed by the study team as an obstacle to efficient identification and assessment of sites. To date, there is no statutory duty on either local or provincial officials to maintain a public record of known contaminated sites.

Until recently sites were assumed to be clean unless contamination was obvious. Today any site once occupied by industry is often assumed to be contaminated unless proven otherwise. The way in which these sites are both identified and referred for assessment raises concerns respecting the liability of regulatory agencies involved in this stage of the process.

Historically, the common law imposed no duty on municipalities to disclose information. Statute law in this province has not changed this principle.[12] The common law principles governing the question of disclosure of information by government authorities are however changing. Municipalities normally have records regarding historical use of local lands, and may also have records of spills or similar environmental events. A number of recent cases in B.C. demonstrate a growth in municipal liability in terms of disclosure of information, holding the local governments liable for providing ready access to municipal records.[13] This growth in municipal liability respecting the disclosure of information is particularly troublesome where the municipality undertakes the development of a partial or preliminary inventory of sites from municipal records, since there is no guarantee that a list of sites developed from this information would include all the sites that actually suffer from soil contamination, or that all sites that would be listed are contaminated.

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[12] One notable exception is the Ontario Municipal Act, s. 78(1) which states that any person may inspect municipal records or documents, subject to certain limited exceptions.

[13] Liability in these circumstances is illustrated by the case of Harnett v. Wallea Construction Ltd. and the Corporation of Delta, an unreported judgment of the Supreme Court of British Columbia, dated March 22, 1989, Vancouver Registry No. C870877. In this case the court found that the failure by the municipality to provide critical information in response to the specific request of the plaintiff was a breach of the duty

A trend to limit liability respecting the disclosure of information in this area has been to direct these parties to other government bodies or private parties. To the extent possible, duties and obligations respecting gathering and assessing information about the site have been transferred from local governments to those benefiting from its services.[14]

Another area of concern is the potential growth of municipal liability in terms of how they carry out their regulatory functions, especially rezoning and development approvals. At present the municipalities take the lead role in identifying and referring suspect sites to the province for assessment of possible contamination. In many respects this makes sense since the municipalities often have better information than provincial authorities of what uses are occupying or that once occupied particular sites. However, the current situation requires the municipality to decide which sites to refer and when to refer them.

Currently the provincial environmental legislation does not provide any guidance on the types of sites that should be automatically referred for initial assessment. Under the Land Title Act, an approving officer has broad discretion on the nature and extent of his investigations prior to approving plans of subdivision. Arguably, extensive reliance on a partial or preliminary list to regulate contaminated sites exposes the municipality to liability for damages if a site not on the list proved to be contaminated, or one on it proved not to be. However, the approving officer has the discretion, where soil contamination is suspected by virtue of available records on the land, to request further reports and assessment of the land in question. The absence of policy or specific guidance in the form of soil contamination by-laws places the onus on the approving officer to discharge his function in an *bona fide* manner.[15] This suggests that in

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of care owed by the municipality arising out of the legal proximity of the plaintiffs and the municipality to whom they were looking for advice and information.

[14] In an attempt to limit liability in this regard, at least one municipality now advises all applicants seeking to rezoning or redevelopment former industrial lands that the lands could contain contaminants, and refers them to the Province.

[15] In the City of Vancouver for instance, although the subdivision by-law predates the issue of soil contamination, some of its provisions may apply. The approving officer

many instances a preliminary assessment of lands in certain instances is unavoidable, and desirable in the sense of providing the basis for discharging responsibilities under the Act.

The desirability of providing guidance respecting the identification and referral of suspect sites is clear. However, in talking about the development of inventories one should be careful to distinguish between those situations where the contamination is only suspected, as opposed to known instances of contamination. Where contamination is known, in the sense that previous records about the site confirm the presence of contaminants that may pose certain risks to health or to the environment, there may be a duty on government officials to ensure that the site is identified and referred for a full assessment and possible remediation. Where the nature and extent of contamination on site is unknown, the official will be required to use his discretion in a *bona fide* manner in deciding whether to refer the site for further investigation and assessment. Existing records concerning past activities or other related matters on the site tend to dictate what is reasonable under the circumstances.

At the very least the municipality is likely required by law to advise the owner and developer of the municipality's concerns and leave it to them to decide if an environmental assessment is required. A recent court case in which the municipality of Delta was found liable for failing to pass on information regarding soil stability indicates a general duty to inform on the part of the municipalities.[16] This duty of care arises out of the decision to control the development of land and to regulate public health and the environment, and in particular to regulate those aspects dealing with soil contamination.

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has powers under provisions of the Land Title Act to refuse a subdivision application if he considers the deposit of the plan to be against the public interest. In particular, he may refuse to approve the plan is he considers, after due consideration of all available environmental impact and planning studies, the anticipated development would adversely affect the natural environment to an unacceptable level. The approving officer is obliged under section 9.5 of the City's Subdivision By-law to ensure that subdivided property is capable of supporting the approved uses. If contamination is suspected, an approving officer would be obliged to conduct an environmental assessment as a condition of subdivision. Whether the City can require environmental assessments as conditions of development and building permits is unclear due to the present wording of the relevant by-laws.

[16] Supra, note 13.

2. Standards Governing Site Remediation

A significant issue for parties to the contaminated sites management has been the lack of standards for the assessment and remediation of these sites. In short, there has been no consistent yardstick for identifying, assessing and resolving site contamination. Accordingly, there is wide agreement that formal standards for site assessment and remediation must be established, and it is generally accepted that this should be a Ministry responsibility.

In the absence of specific standards, the owner of a contaminated site is faced with great uncertainty about how to identify and assess the site contamination, how to determine approaches to remediation, and how to predict costs associated with the assessment and remediation process. The property owner, the local government, and the Province now rely heavily on the advice and expertise of professional consultants in these matters. Owners and their consultants, government authorities, the public and other involved parties cannot determine when the remediation has been completed in a manner which suitably relieves human health and environmental impacts. Thus, issues of ongoing liability remain unresolved.

Several secondary issues emerge from the consideration of cleanup standards.
a. The determination and assessment of risks associated with exposure to contaminants is subject to judgement and perception. Thus, it is critical that the rationale for standards and their interpretation is clear and defensible.

b. Measuring contaminant levels is subject to significant variability from differences in sampling and analytical procedures. Thus, it is important that consistent and reliable sampling and analytical procedures be developed and required.

c. Communication with the public about matters of assessment and the interpretation of standards in risk assessment is a difficult issue. The interpretation of standards in risk assessment is complex and subject to a limited knowledge base. Assumptions are made, and it is accepted practice to error on the side of safety. Standards are normally interpreted in a manner to provide a significant margin of safety. However, this is often not understood. Furthermore, expressions of risk are often difficult to understand in lay terms; there is a tendency for the public to respond with demands for zero risk.

d. Potential public health impacts differ from potential environmental impacts. This distinction needs to be clearly made, and standards should consider both types of impacts.
e. The interpretation of standards to reach decisions about remediation must balance

the desire for removing public health and environmental risks against the reality of physical and financial constraints. Extreme demands for site cleanup can make remediation prohibitive, and block all action to cleanup contaminated sites. Extreme emphasis on financial constraints can lead to remediation which falls short of resolving public health and environmental concerns. A balanced and consistent approach is clearly essential.

The Ministry is currently developing a "Criteria for Managing Contaminated sites in B.C.". This document will present Ministry of the Environment standards and policies for managing contaminated sites. The standards will apply to contaminated soils, groundwater and drinking water, and will be similar in form and content to the Ministry's "British Columbia Standards for Managing Contamination at the Pacific Place Site (April 5, 1989). The standards were derived from criteria developed by others including:

- the Canadian Council of Resource and Environment Ministers,
- the Province of Quebec,
- the Ontario Ministry of the Environment,
- Canadian guidelines for drinking water quality, and
- British Columbia's Special Waste Regulation and Pollution Control Objectives under the Waste Management Act.

The Ministry consulted with public health and environmental experts in establishing these standards, and the standards may be adjusted as new human health and environmental information becomes available.

The Ministry intends that the determination of standards for a specific site will consider the types and levels of contaminants, the particular environmental media that is contaminated as well as the proposed use of the contaminated land.

As with the Pacific Place Standards, two types of standards have been developed. Numerical contaminant concentration standards will be used to determine when detailed investigation, and/or site remediation is needed, and when the site is properly completed. This approach addresses both human health and environmental impacts and applies to situations where contaminants can be removed to levels less than the applicable numerical standards.

The second type of standard involves site specific risk assessment and risk management, and addresses only public health issues. Potential human health risks posed by contaminants are derived and are compared to numerical standards corresponding to levels of risk that are considered to be publicly acceptable. This approach applies when there are potential human health impacts and exposure to contaminants is reduced to acceptable levels by either contaminant removal or containment (when removal is limited by physical or financial constraints). It should be noted with this second approach that potential environmental impacts will still have to be addressed even if the risk assessment approach is used for public health impact assessments.

The Ministry does not currently have guidelines on the formulation and implementation of site assessment programs, but will provide guidance on a case-by-case basis. This includes guidance on assessment procedures, selection of indicator contaminants to be monitored, and acceptable sampling and analytical methods and procedures.

3. Parties Involved in the Process

Owners , developers and municipality find it difficult to identify qualified and competent consultants, since there is no certifying body or professional organization for many "environmental consultants".

The technical consultant plays a crucial role in the overall process of contaminated sites management. The consultant must formulate and implement the field program which allows the degree of contamination and potential impacts to be accurately and representably assessed, and formulate a realistic and technically and cost effective remediation program. The consultant may also have the role of communicating the significance of assessment and remediation actions to the regulatory agencies and to the public.

The selection of consultants is an issue about which site owners and municipal regulatory personnel have expressed concern. Diverse and sophisticated expertise is required for site assessment, and it is difficult for involved parties to identify and verify the qualifications and competence of consultants. Unsophisticated on non-technically oriented owners may select consultants primarily on the basis of their cost estimates for assessment programs, only to find that the work is inadequate to fulfill the requirements of the Ministry. Although many express a desire for the Ministry to qualify consultants, it is more realistic for the Ministry to be specific and clear about the minimum requirements for site assessment. It is then possible to verify that the consultant is technically qualified to provide the required expertise. From the Ministry's point of view, additional responsibilities and resulting liability in this area may however necessitate the imposition of very rigorous requirements in terms of qualifying consultants or in terms of setting site investigation requirements.

From the consultant's point of view, liability associated with inadequate or complete assessment is a concern. Financial resources are always limited. In the absence of well-defined minimum requirements for assessment (or specific approval of the proposed sampling and assessment program) the consultant is concerned that the assessment may miss some part of the site contamination and result in liability for the subsequent potential consequences.

The public involvement in the process is not defined in law or policy. An effective public education/involvement component is crucial given the technical complexity of impact assessment for contaminated sites.

Liability for Clean-up

Both the common law[17] and statute law may expose current and past property owners to the costs and expenses incurred in remediating a contaminated site.

At common law, the purchaser of contaminated property "buys liability" in the sense of facing civil liability for torts resulting in damages to adjacent property owners. In certain instances, the property owner may in turn have a claim against the person who sold him the property. The common law rights upon which a person may claim compensation from an owner of contaminated land are set out in Appendix C. Rights to compensation and indemnification against past owners in these cases are also set out in the Appendix.

Environmental statutes may impose civil and quasi-criminal liability for pollution emanating from property. In British Columbia , there has been limited interference with common law principles in assessing liability for the costs of clean-up. The costs of complying with the requirements imposed by the Waste Management Act are generally visited on the current owner of the contaminated land. There are however a couple of notable exceptions to this approach.

In 1987, British Columbia enacted section 33.1 of the Waste Management Act. This liability provision allows the government to recover the cost of cleaning up "waste management facilities" that have been inadequately closed or where long term care and maintenance is required *from the person who owned the facility immediately before the facility's closure.* It should be noted that the section 33.1 trust fund, which must incur expense before an owner or former owner can be held liable, has not been set up.

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[17] The common law is a body of legal principles that have evolved over a period of years from the decisions made by judges both in England and in Canada.

It is unclear whether these provisions apply to historically contaminated sites. Reference in section 33.1 is clearly to a "facility". An historical special waste contaminated site is not a facility[18] as defined by the Special Waste Regulation except in limited circumstances. It is also arguable that a site with contaminants (but not at special waste levels) should not be characterized as a waste management facility unless on site treatment or storage is contemplated.

At first glance, the provisions of section 22 of the Waste Management Act also appear to alter the principle of *caveat emptor*, and allocate the costs of clean-up to those people who originally caused the problem. The facts and comments of the West Fraser case, discussed earlier, suggest this conclusion. However, the real effect of section 22 is to expose responsible parties to the threat of criminal prosecution in default of the order. Currently, the Act only provides for criminal enforcement of section 22 of the Act.[19] Section 22 does not purport to allocate costs between these parties. It is still open to the parties named in a section 22 order to seek indemnification from other parties according to the relevant principles of common law and contract law.

However, the clear intent of the Waste Management Act is to impose the responsibility for prevention and abatement of pollution on those people who caused it in the protection of the public interest. In this sense the legislation does reflect the "polluter pay" principle.

The "polluter pay" principle refers to assignment of liability for failure to discharge the duties and responsibilities imposed by statute. An important distinction between the types of liability that a party can be exposed to should be kept in mind. The Waste Management Act imposes criminal liability for failure to comply with its prohibitions and orders.[20] Owners of contaminated land may be liable under the Act for the consequences of a failure to comply with a cleanup order involving the remediation of soil and groundwater contamination on their property, even if the contamination was there prior to their acquisition of the property. The polluter in this scenario bears both the financial cost of complying with the order and the exposure to criminal liability for failure to comply with the order. It should be remembered that statutory liability in this regard is not without regard to some degree of fault. This notion of fault as the basis of liability is evident in the West Fraser case where the court, commenting on the scope of liability imposed by section 22 of the Act, stated: " I would have to see much stronger and more specific words than those to convince me that the legislature intended absolute liability on an innocent, ignorant (in the sense of not knowing) owner who had nothing to do with, and no knowledge of, what had occurred."

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[18] See the specific exclusion in the definition of a facility in section 1 of the Special Waste Regulation. The April 1989 amendment to the Regulation addressed this point by adding "in situ" management facilities to the definition of facilities and imposing approval requirements on these facilities.

[19] For instance, the Act does not authorize the registration of the order in the Supreme Court of B.C. and the enforcement of the order as such.

In the more literal sense of the word, the polluter pay principle also refers to the question of civil liability, that is who will bear the full costs and expenses of the clean-up, and any resulting loss or damage arising from the contaminated property. Looking at the legislation from this perspective, it is clear that the current legislative scheme is not an aggressive expression of the principle since it does not purport to alter the basic common law principles of liability for the costs of clean-up or of compensation for loss or damage. One of the major problems regarding the scope of the current legislative scheme is the lack of power to undertake remedial measures at the expense of a property owner.

In this sense, the civil liability provisions for the remediation of "environmental emergencies" under the Environment Management Act do reflect a more aggressive expression of the "polluter pay" principle. However, section 6 of the Act essentially codifies the common law principle of negligence, assigning the costs of responding to an environmental emergency to the *person whose act or neglect caused or who authorized the events that caused the environmental emergency in proportions the court determines.* Under section 5 of the Act, where an environmental emergency exists and an immediate response is required, the Minister may take action "to prevent, lessen or control any hazard that the emergency presents", and recover costs and expenses incurred in responding to the emergency. It is worth noting that the costs and expenses must be reasonable; section 6(4) provides that the amount recovered may be reduced by the court where the expenditure is either "(a) excessive, taking into consideration the magnitude of the emergency and the results achieved by the expenditure, or (b)

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[20] This type of criminal liability is referred to as strict liability, meaning that a person will be found to be liable unless they can demonstrate that they exercised all due diligence in discharging their duties under the Act. Liability rests on some notion of fault in the sense of having not exercised all due care in the circumstances.

unnecessary, taking into consideration the unlikelihood of significant material loss to any person had the government not acted under this section."

A number of other jurisdictions have dramatically altered the common law principles governing the assignment of costs for clean-up. Ontario has made a number of significant changes to the basis of liability in dealing with spills of toxic substances. The United States has also imposed clean-up liability for contaminated lands on a broad category of persons under its 'Superfund' laws. The details of these changes can be found in Appendix D. Perhaps what should be noted is that the Superfund laws do not always impose liability on the "polluter" as one might assume, since the imposition of liability does not, in most cases, require any showing of culpability on the part of the landowner.[21]

The practical limitations to relying on the common law approach to assigning civil liability need to be highlighted. Where the 'responsible' party cannot be identified, cannot be pursued by due process of law, or is unable to pay the required remedial costs, the effect may be to visit the entire costs of clean-up on an 'innocent' owner of contaminated land who attempts to redevelop the land in question. The potential unfairness of such an outcome is obvious, since imposing the full costs of remediation on a responsible party may in many cases result in financial hardship.

Particularly troublesome in the context of historical contaminated sites is the idea of retroactively visiting the costs of remediation on a party that, at the time, may have been in full compliance with the law or may have been following standard industry practice. The failure in many instances of the government to regulate, or to regulate with sufficient stringency, these matters raises a number of troubling questions respecting the fairness of imposing additional requirements after the fact on past owners or operators of the site. Such an approach has a punitive aspect, since there may be limited opportunities for past owners or operators to externalize the costs of the additional remediation requirements. On the other hand, current owners do enjoy beneficial interest in the property and have opportunities to recover the costs of remediation through escalation of property values.

The Netherland's approach to offering indemnification to persons in these circumstances is worth noting. Here property owners are entitled to indemnification for costs incurred from the government where the person receiving the order is *likely to suffer financial loss or damage which he cannot reasonably be expected to bear either wholly or in part and where indemnification has not or cannot be provided by*

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[21] The exceptions to this general rule are laid out in Appendix D.

any other means. The full details of this scheme are set out in Appendix D.

In conclusion, the assessment and remediation of historically contaminated sites is not governed by an aggressive application of the "polluter pay" principle under the provincial legislative scheme. Provincial legislation does not provide the general authority to undertake remedial action at the expense of a responsible party, except in limited instances relating to the decommissioning of a waste management facility, or where the event can be characterized as an environmental emergency. This authority does not extend to the remediation of historically contaminated sites.

Chapter 3:

Managing Contaminated Sites in British Columbia: A Prescription for Reform

In previous chapters of this report we have outlined the many significant and difficult issues connected to the management of contaminated sites in British Columbia. Unfortunately, many of these issues are not easily resolved under the current legislative framework which applies to site remediation. Deficiencies in existing legislation relate primarily to:

- the limited scope of authority in the legislation,
- the lack of standards governing soil remediation,
- insufficient controls to ensure satisfactory assessment and remediation, and
- the inability to enforce legislative requirements in certain situations.

The focus of this chapter is on the changes required to provincial environmental legislation in order to support an effective program for the management of contaminated lands within the province of British Columbia.

Goals

Our recommendations for managing contaminated sites within the province of British Columbia are designed to achieve two main goals.

1. *The scheme for managing contaminated sites in British Columbia should be as consistent as possible with the jurisdictional responsibilities of the various government agencies involved in the management of contaminated lands within the province.*

During the course of this study we looked at the constitutional principles governing jurisdiction over the management of contaminated sites within the province, and concluded that the province does have the primary constitutional jurisdiction to regulate soil contamination within the province, and the related area of public health.[22] The province has delegated to local governments authority to control a number of related matters, including nuisances, local health matters, and the development of local lands.[23]

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[22] The B.C. Waste Management Act and other statutes provide the province with the legal authority to regulate in areas over which it has jurisdiction.

Consequently, the proposed process should recognize the primary provincial responsibility for protection of the public health and the environment. The process should also recognize the primary municipal responsibility for the controlled development of local lands.

2. *The scheme for managing contaminated sites should encompass contaminated sites of all types.*

In earlier chapters we outlined the instances where authority to require assessment and remediation may be inadequate, in the sense of not encompassing all types of site contamination and not providing controls over the various aspects of the assessment and remediation process. Specific types of contaminated sites that would be captured by the proposed scheme include undeveloped and developed sites contaminated with any substance from any source (including dangerous goods, special wastes, radioactive materials) where such contamination is potentially posing a danger to the environment or public health.

The Waste Management Act already contains a number of provisions respecting the remediation of sites in certain circumstances. Therefore, the proposed process should also be consistent with assessments and requirements for the cleanup of sites from types of contamination currently covered by existing legislation, such as emergency spills or fires.

Objectives

Our proposals focus on two key objectives:

a. *timely and effective implementation of site cleanup, and*
b. *fair and equitable cost assignment.*

Repeatedly we heard from officials at all levels of government that the first order of priority should be the remediation of the contaminated lands that pose risks to human health or the environment, with cost assignment as a secondary consideration.

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[23] Examples of this delegation include the provisions under the Waste Management Act delegating air emission control authority to the Greater Vancouver Regional District, or the exemption of effluent discharges under 5000 gal./day from Waste Management Act requirements in favour of the Health Act and the Sewage Disposal Regulations under that Act.

Principles

The following principles have shaped our recommendations for changing the process for managing contaminated sites and the supporting legislation:

1. *Contaminated land must be properly managed, using specific procedures and criteria.*

2. *In addition to being reactive to specific situations, the contaminated sites management process should allow government-initiated assessment and remediation.*

3. *The process should not interfere with the timely cleanup of contaminated sites, through unrealistic or excessive cost requirements.*

4. *The process should be flexible, to allow for efficient management of situations of different degrees of complexity. The process should distinguish between complex major site clean-ups and those of a more routine nature such as the clean-up of leaking underground service station storage tanks.*

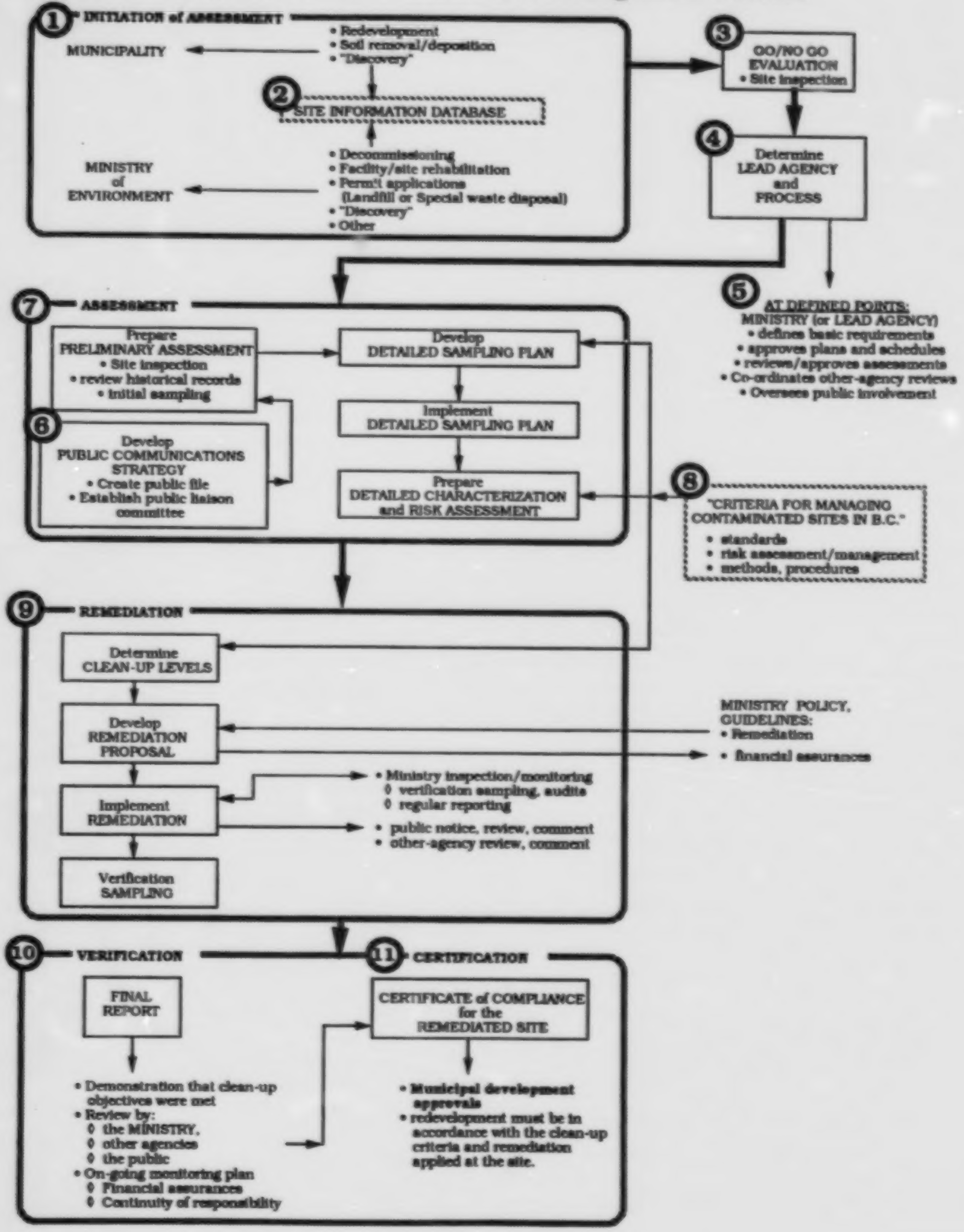
5. *The process should provide for routine review of higher priority sites, with discretionary assessment of lower priority sites.*

6. *Responsible parties should be required to take the steps necessary to ensure the remediation of contaminated sites.*

7. *Where responsible parties do not take the necessary steps, the process should provide government officials with the direct authority to remediate sites.*

8. *The process should also facilitate full recovery of remediation costs by government.*

Figure 3.1: Proposed Contaminated Sites Management Process


① INITIATION of ASSESSMENT
MUNICIPALITY
• Redevelopment
• Soil removal/deposition
• "Discovery"
② SITE INFORMATION DATABASE
MINISTRY of ENVIRONMENT
• Decommissioning
• Facility/site rehabilitation
• Permit applications (Landfill or Special waste disposal)
• "Discovery"
• Other
③ GO/NO GO EVALUATION
• Site inspection
④ Determine LEAD AGENCY and PROCESS
⑤ AT DEFINED POINTS:
MINISTRY (or LEAD AGENCY)
• defines basic requirements
• approves plans and schedules
• reviews/approves assessments
• Co-ordinates other-agency reviews
• Oversees public involvement
⑦ ASSESSMENT
Prepare PRELIMINARY ASSESSMENT
• Site inspection
• review historical records
• initial sampling
⑥ Develop PUBLIC COMMUNICATIONS STRATEGY
• Create public file
• Establish public liaison committee
Develop DETAILED SAMPLING PLAN
Implement DETAILED SAMPLING PLAN
Prepare DETAILED CHARACTERIZATION and RISK ASSESSMENT
⑧ "CRITERIA FOR MANAGING CONTAMINATED SITES IN B.C."
• standards
• risk assessment/management
• methods, procedures
⑨ REMEDIATION
Determine CLEAN-UP LEVELS
Develop REMEDIATION PROPOSAL
Implement REMEDIATION
Verification SAMPLING
MINISTRY POLICY, GUIDELINES:
• Remediation
• financial assurances
• Ministry inspection/monitoring
◊ verification sampling, audits
◊ regular reporting
• public notice, review, comment
• other-agency review, comment
⑩ VERIFICATION
FINAL REPORT
• Demonstration that clean-up objectives were met
• Review by:
◊ the MINISTRY,
◊ other agencies
◊ the public
• On-going monitoring plan
◊ Financial assurances
◊ Continuity of responsibility
⑪ CERTIFICATION
CERTIFICATE of COMPLIANCE for the REMEDIATED SITE
• Municipal development approvals
• redevelopment must be in accordance with the clean-up criteria and remediation applied at the site.

The Proposed Contaminated Sites Management Process

Figure 3.1 outlines our recommendations for a process to manage contaminated sites in British Columbia. The management process entails four major phases:

- initiation of assessment,
- assessment,
- remediation, and
- verification and certification.

The following discussion describes the proposed contaminated sites management process. It includes our recommendations on the appropriate role and responsibilities of provincial and local governments and property owners in the process, and the technical and administrative requirements for appropriate management.

Initiation of Assessment (1)

The situations or events which would trigger the initiation of the contaminated sites management process are summarized in Figure 3.1. Specific triggers for initiating the process (i.e., a GO/NO GO Assessment) would be defined in legislation by the Ministry. Initiation of the assessment process (through identification of a potentially contaminated site) could occur at either the municipal or provincial level.

In setting up a process of routine government-initiated review for certain sites, two options were considered. The restrictive transfer programs popular in the United States essentially trigger a mandatory review of certain sites upon 'change of ownership'. The alternative is to require routine review in the event of a 'change of use'. Our proposals reflect a decision to rely primarily on *change of use as the basis for routine review of suspect sites*. This approach most closely reflects the current approach relied on across Canada, and has the practical advantage of not interfering with the current market transactions in land. It should not be assumed that assessments will not be initiated by intending purchasers.

Our proposal is to require owners or operators of industrial establishments to report changes in operating status on these lands, and to provide a preliminary assessment of soil and groundwater conditions on the site. Where a change of use from industrial to residential or commercial use is contemplated, remediation would then be required under the proposed scheme. Where no change of use is contemplated, the Ministry will nevertheless have the discretionary authority to require immediate action to remediate hazardous soil conditions or to permit deferral of the work with appropriate public notice of the contaminated status of the site.

INITIATION AT THE MUNICIPAL LEVEL would be triggered by:

- development/ redevelopment applications,
- applications for municipal permits to remove/deposit soil to/from a site,
- "discovery" by municipal authorities by any other means.

Development/rezoning applications will continue to be the most common mechanism for identifying contaminated sites at the municipal level. Municipalities in the province of British Columbia have jurisdiction over the controlled development of local lands. In light of their familiarity with these lands, they are well placed to continue to identify suspect sites.

The proposed process would require the applicant to provide a chronological listing of known activities which have occurred over the developed history of the site. A formal search would be mandatory for specified high priority types of sites (as defined by the Ministry in legislation). Disclosure (by an owner or developer) of known historical activities and any known or suspected contamination would be mandatory . Legislation (and pursuant regulations or guidelines) would stipulate minimum requirements for searching and reporting historical information, with appropriate penalties for failure to comply.

Information on past site activities as well as municipal records submitted by the owner/developer would be reviewed by the municipality for potential sources of contamination. The Ministry would require (in legislation) the mandatory "Go/No Go" Evaluation (see Item3) of high priority sites. Sites for mandatory referral would include sites of current or former "industrial establishments" and or major projects in an area of suspected contamination. "Industrial establishments" would be defined in regulation and would include any establishment engaged in operations which handle, process, transport or dispose of special wastes or hazardous substances (above or below ground). "Industrial establishments" could be conveniently defined by a specific listing of activities (as defined by Standard Industrial Classification [SIC] categories or their equivalent) encompassing all site situations which the Ministry wishes to be considered for potential site contamination. Lower priority categories might also be defined, with discretionary power assigned to the municipality (as opposed to mandatory referral for a Go/No Go evaluation).

Permits to remove/deposit soil to/from a site are generally required by the by-laws of municipalities. It is recommended that the source site for transported soils be assessed through the same mechanism described above.

"Discovery" of potential or known site contamination by municipal authorities may occur. In some cases referral of the site for Ministry assessment would be mandatory, in other instances the authorities could, at their discretion, trigger assessment of the site.

SITE ASSESSMENT AT THE PROVINCIAL LEVEL would be initiated by:

- decommissioning of facilities
- rehabilitation/redevelopment of facilities
- permit applications
- "discovery" by provincial authorities by any other means.

Decommissioning of any "industrial establishment" or other designated type of higher priority site would require mandatory reporting to the Ministry as described for municipal development applications (above). The "Go/No Go" Evaluation would be mandatory for high priority sites.

Facility/site rehabilitation plans should be subjected to the same review mechanism described above. The "Go/No Go" Evaluation would be mandatory for higher priority sites.

Current legislation would encompass situations where a permit would normally be required for proposed modifications. This should be extend ed to include modifications at "industrial establishments" and other high priority sites which would disturb ground, but might not currently require a permit (i.e., no waste discharge is involved).

Applications for permits to transport or dispose of soil (or other debris or material removed from a site) to landfill[24] or special waste disposal facilities should trigger consideration of the source site for potential contamination. Disclosure of actual or suspected contamination would be mandatory, and a "Go/No Go" Evaluation of the source site would be mandatory for high priority sites.

"Discovery" by Ministry personnel may occur by any other means (e.g. spill reports, former employee reports, public calls, review of old waste management files). In such cases, the Ministry would be empowered to trigger the site assessment process at their discretion. Legislation would have to define criteria for initiating the process. While evidence of actual contaminant discharge would not be required (as is currently the case), the process could be initiated where there is a reasonable belief that the site may be contaminated and poses a potential hazard or risk to human health or to the environment.

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[24] Currently there is no requirement for a provincial permit if the contaminated soil (not characterized as special waste) is going to a permitted landfill. An alternative to provincial controls regarding disposal of contaminated soils, is review of criteria governing permitting landfills and strict enforcement of restrictions at the landfill site, which is often a municipal responsibility.

Other formal triggers may be considered and specified by the Ministry. For example, Ontario has a process whereby major employment terminations are reported to the Ministry of Labour. The MOE reports this occurrence to the Ministry of Environment and the need for considering a preliminary assessment is then considered.

Other routine Ministry dealings with a facility or site may also trigger a possible review of the soil conditions where information gives rise to concern about potential contamination. The Ministry may wish to formalize these referral arrangements, particularly where other levels of government or other Ministries are involved.

The Ministry would have the option of requiring a review of suspect sites discovered by any one of these means. This option would allow the Ministry to trigger the process at their discretion.

Another informal trigger of the assessment process may be at the time of sale of the suspect site. Increasingly, purchasers and mortgage lenders insist on site evaluations prior to closing. In some cases, the Ministry may be asked for advice on the sufficiency of the inquiry where contamination is suspected, and on the adequacy of the remediation where this is a condition of the closing.

Site Information Database (2)

Our proposals regarding requiring routine reviews of certain categories of sites offers some guidance to officials at both the provincial and municipal level. Given the mandatory nature of some elements of the contaminated sites management process, we feel it is incumbent on the provincial government to establish a sites information database to support the identification and assessment process. The database should list industrial establishments considered or assessed for contamination. The database should identify the types and location of known information about the site (including aerial photos, well logs, assessment reports, etc). The data base would list the site status (with respect to contamination) and simply reference the formal Ministry file on the site assessment and remediation process. Where municipalities have an information database on sites within their jurisdiction, the Ministry database would reference that file.

In addition to listing all industrial establishments, the database should also contain a record of site status for all sites referred to the Ministry for preliminary assessment.

Information on this database should be available to the public, subject to government policy respecting the handling of proprietary information.

GO/NO GO Evaluation (3)

Any of the above-noted triggers (Item 1) would initiate a "GO/NO GO" Evaluation of a site to determine the need for a detailed assessment. Specific standard minimum requirements for the assessment would be stipulated by the Ministry in regulations (including format and content of a written information package submitted by the site owner).

The assessment would require a site visit by a Ministry official (or delegated official as discussed in Item 4). The assessment would be undertaken by the Ministry (or delegated official) and a Go/No Go decision would be issued. If no further assessment were indicated, a letter of non-applicability would be issued to the developer/owner and the normal municipal approvals process would proceed. The decision would be registered on the Ministry's site information data base.

If a preliminary assessment were indicated, the formal assessment process indicated in the diagram would be triggered.

Guidance to officials making Go/No Go decisions is required in the form of minimum information requirements. This will be particularly important where the initial evaluation will be made by municipal officials acting on behalf of the Ministry (where the lead role has been delegated). The Ministry should outline the format and content of the information package to be submitted by the site owner. The Ministry should also set out the circumstances in which a site inspection should be made. It may be desirable to outline these requirements in regulations. The Ministry may wish to outline in policy or guidelines the various sources of information that should be taken into account, or other considerations which indicate potential contamination.

Determine LEAD AGENCY and PROCESS (4)

If the Go/No Go evaluation indicates that assessment is required, the lead agency and administrative and assessment procedures would be established at the outset. The legislation should define a number of possible options.

LEAD AGENCY

The province should take the lead role in managing contaminated sites. This reflects the primary jurisdiction of the province in these matters. However, in light of the important role that municipalities play in the controlled development of land, the provincial scheme should be sufficiently flexible to permit delegation of certain aspects of the process to the municipality where this arrangement is mutually acceptable. In many cases this will be desirable since such an arrangement will permit the municipality to coordinate the various reviews and approvals for local lands, thus ensuring that the entire process is handled efficiently.

All interested and involved agencies would be identified and be made aware of the proposed assessment at this stage in the process. Criteria for deciding inter-agency involvement should be a matter of policy and would depend on the complexity of the situation. For example, the Ministry might be the lead agency, with only nominal reporting to the municipality (or other agencies as appropriate). In other cases, it may be appropriate for the Ministry to report regularly and to consult with the municipality and other agencies. There should also be an option for the establishment of a Task Force (e.g., involving Environment Canada, the Ministry of Health, and other agencies having jurisdiction or a clear interest) for large and complex situations.

PROCESS

The overall process should be flexible and should be geared to the complexity of the situation. A streamlined "cookbook" approach should be possible for recurring situations such as the assessment and remediation of potential underground storage tanks involving petroleum products, particularly where systematic plans for the evaluation of several facilities from a company or industry are involved. At this stage, all other interested and involved agencies would be requested to register, in writing, any requirements regarding the proposed assessment and remediation. The lead agency should ensure that these requirements are all disclosed at this point and are consistent with the overall process.

Role of the Ministry of Environment (5)

The management process should have sufficient flexibility to permit the delegation of certain functions to local governments. However, the following responsibilities of the Ministry should not be delegated:

- defining basic assessment and remediation requirements (consistent with minimum requirements set out by the regulations); and
- maintaining an Official File Record of all data, assessments, reports and decisions.

In addition, all decisions and powers respecting the expenditure of public funds to effect remediation of a contaminated site would remain with the Ministry. For this reason, the enforcement of provincial legislative requirements should remain the responsibility of the Ministry.

The functions that could be delegated to a municipality include:
- the approval of all plans and schedules;
- the review and approval of all assessments;
- the co-ordination of all communications with (including reviews by) other agencies;
- the determination of the extent of public involvement (Item 6);
- the requirement of financial assurances for the due performance of the remediation process ;
- the certification of the remediated site.

There are two possible models of delegation. Delegation may occur only for those sites for which the local government is defined as the lead agency, or in the alternative for certain functions associated with all sites within a specified geographic area. The first approach to delegation may be the preferred approach, since the responsibility for the assessment and certification of remediated sites involving large and complex sites might, from a practical point of view, ideally remain with the Ministry. The actual choice of approach is a matter for discussion between the Ministry and local governments.

Depending on the wording of the delegating legislation, the delegated official may be acting as agent of the provincial Crown. In this event, the official carrying out the delegated authority has the same protection as a provincial official in carrying out his duties. The Ministry may wish to provide detailed policy guidance to delegated officials respecting the manner in which these functions are carried out.

Where the Ministry retains the lead role throughout the entire process, consideration should be given to the role of regional and headquarter units in the process. Functions that might otherwise be delegated to a municipality might be appropriately carried out by regional units within the Ministry. We make no specific recommendations in this regard recognizing that the solution rests on questions relating to expertise and resources within the Ministry.

Public Communications Strategy (6)

In Canada, the extent of public involvement in contaminated site management is often a matter of policy as opposed to legislative requirement. However, the United States has adopted legislative provisions ensuring public participation in the process. From the point of view of managing future risks to public health and the environment, and in light of some the uncertainties about these risks, we feel that at a minimum there should be a formal legal requirement for public notification about key steps in the process, and the owner should be required to maintain, and make accessible to interested parties, a copy of key elements of the public file. This information would also be available from the official file records maintained by the Ministry.

At the outset of the process, the site owner should be required to develop a public communications strategy. The scope of the strategy should be consistent with the complexity of the situation; the specific strategy would be established and approved by the Ministry at this stage of the process. The Ministry may wish to develop a guideline document to assist owners in devising an appropriate strategy.

More complex situations would require the establishment of a public liaison committee, the conducting of public meetings and/or opportunities for the public to review and comment on the assessment and remediation process and decisions.

The public should be accurately informed about the process, and should be given a meaningful opportunity to review and comment on the specific components of the process. However, the public role should be advisory, and technical decisions should be the responsibility of the lead agency.

As noted in the listing of roles and responsibilities above, the lead agency should oversee public involvement. While the arrangement, planning and expense of the public program should be the responsibility of the site owner/developer, the lead agency should be present at and should chair all public meetings.

Assessment (7)

The detailed technical assessment and review of contaminated sites would be similar to the process which is currently used by the Ministry (as indicated in the diagram). The element missing currently is the application of formal criteria for evaluating contaminated sites (see Item 8).

Criteria (8)

"Criteria for Managing Contaminated Sites in B.C." are currently under development by the Ministry. The indicated process would utilize these criteria as formal requirements, for the application of the assessment and remediation process. These criteria may take the form of regulations or may be incorporated from guidelines into site specific approvals.

The criteria should specify approved methods and procedures for undertaking an assessment wherever this is possible. Specific minimum requirements should be indicated. The general scope of assessments should also be indicated, so that owners/developers have a realistic idea of the cost and nature of the assessment process. From the point of view of property owners and professional consultants, there may be a number of advantages to having these criteria clearly and unambiguously stated in the form of a regulation pursuant to the Waste Management Act. On the other hand, such an approach lacks flexibility. Given the potentially complex nature of large site assessments it may be desirable to have procedural requirements (including analytical protocols) set out in regulations, with technical criteria or standards set out in guidelines and incorporated into the site assessment and remediation on a site specific basis and reflected and reflected in the formal conditions attaching to required permits or approvals.

It is important that consultants and technical personnel who undertake assessments should be suitably qualified. Consultant selection will be facilitated if the technical requirements for assessments are clearly and specifically stipulated in supporting legislation and regulations. Another option would be provincial certification of labs which are qualified to undertake the required analytical work, although this may be unnecessary if there is a clear definition of analytical protocols to provide the necessary vehicle for standardization of laboratory procedures.

Remediation (9)

The remediation plan would evolve from application of the proposed Ministry "Criteria for Managing Contaminated Sites in B.C." to the specific contaminated site situation; paths of exposure of contaminants should be considered in the assessment. Ministry policy for the application of these Criteria should require that:

a. The remediation should provide protection for the environment and public health (with respect to the release and exposure to contaminants, and as demonstrated by the analysis of the assessment reports);

b. The proposed remediation must be practical from an economic, technical, administrative and legal standpoint; and

c. Permanent solutions should be favored in the selection of remediation options.

The remediation plan and implementation would be subject to other agency review and public review and comment as set out in requirements developed under Items 4 and 6.

Consideration should also be given to the need for criteria for landfilling of contaminated soils. This implies development of criteria by the Ministry for contaminants, in addition to special wastes, that are not suitable for landfill disposal. This requirement may also interact with other legislation (e.g., the Soils Conservation Act).

The lead agency would oversee the implementation of the remediation plan, requiring regular reporting from the owner/developer, and through site inspections , verification sampling and sampling audits.

Verification (10)

Verification sampling by the owner/developer would be the final stage of remediation. Verification that the site has been remediated according to the approved remediation plan would be provided by the owner/developer in a final report. The report would demonstrate that the cleanup objectives were achieved. The report would be reviewed and approved by the lead agency and all agencies involved in the process for that particular site.

Public notice would be required at this stage and, in accordance with the public communications strategy (Item 5), public comment would be received for consideration before final approval and certification.

If ongoing monitoring is required, a monitoring plan would be reviewed and approved by the lead agency. The preferred option would be to ensure that all monitoring is completed prior to issuing the final approval and certification.

Certification (11)

The lead agency would issue a certification that the site has been remediated "to existing provincial standards". The certification would outline any conditions attaching to the final approval of clean-up work on the site. Where on-going monitoring of the site will be required, the document should indicate the party responsible for the on-going activity and stipulate the required monitoring program and reporting arrangements.

Where there is uncertainty about the success of the clean-up, that is the measures taken are of an interim nature, the Ministry should have the option of requiring a bond or clean-up fund contributions to ensure proper closure, decommissioning, or remediation of the site.

Proposed Legislative Changes

Changes to the current provincial legislative scheme will be required in order to implement our proposals respecting the process for managing contaminated sites in British Columbia. For the most part, these changes can all be brought under the provincial Waste Management Act. A summary of these proposals is provided in Table 3.1.

TABLE 3.1: Proposed Changes to the Regulatory Framework

1. Broaden the Scope of Legislative Authority under the Waste Management Act	
a. Enable routine review of designated types of sites • enable routine review of sites of high priority sites • enable certification of compliance with established standards for assessment and remediation • enable statutory restrictions on the future land use of uncertified property	**Comments** The Ministry should define criteria for "high priority sites" "Industrial establishments" must be specifically defined for guidance (e.g., by listing selected S.I.C. numbers) The Ministry should establish a contaminated sites database The Ministry should publish "Criteria for Managing Contaminated Sites in B.C."
b. Create Authority to Require Assessment and Remediation • provide discretionary authority to order assessment and remediation (conditional on a reasonable belief that the site is contaminated and poses a potential hazard or risk to human health or the environment)	
2. Enable Delegation of Authority	
The Ministry plays the lead role in the site management process • enable delegation of the lead role in the management process to municipalities (where mutually agreed) • authorize "an official designated by the Minister" to grant all approvals and certifications • Functions of the Ministry not to be delegated include: ◊ establishing the basic site management process ◊ defining standards of assessment and remediation ◊ enforcement	The Ministry should develop guidelines for qualifications and responsibilities of delegated officials and the form of the delegation agreement.
3. Set Out Mandatory Duties and Requirements in Legislation	
• stipulate the legal obligations imposed on owners and operators of sites routinely assessed (item 1a): ◊ disclosure and submission of information ◊ preparation of a public communications strategy ◊ preparation of the all required assessments ◊ development and implementation of a remediation plan, and ◊ submision of a final report demonstrating compliance • provide a legal mandate to government officials to take required decisions and actions including: ◊ issuing letters of non-applicability ◊ approving assessments and remediation plans ◊ issuing certification of compliance • provide the authority to make approvals and/or certification conditional on posting financial guarantees, monitoring plans or other measures to ensure the long term care and maintenance of the site.	The Ministry should establish minimum requirements for public consultation and develop policy and guidelines for public communications plans.
4. Strengthen Enforcement Provisions	
a. Orders to take action • authorize the Minister to order specified action (to assess and/or remediate) when: ◊ the necessary approvals and certification are not obtained ◊ a suspect site is discovered by officials • enable issuance of Orders to present and past owners and operators of sites	The Ministry should establish fines and penalties.
b. Statutory assignment of costs • authorize direct action by the Ministry to rehabilitate a site in default of an Order • authorize the Minister to recover reasonable costs involved the clean-up • assign civil liability on the basis of strict liability • authorize the government to assume costs • allow discretion of the Ministry to offer partial contribution of costs	Strict liability imposes civil liability on: ◊ past owners who knew of the existence of the site and failed to disclose it to the purchaser, and ◊ current owners who fail to exercise all due diligence ascertain the existence of contamination on the site and to prevent the release of a hazardous substance. The Ministry should develop specific policy/guidelines for the use of public funds in site cleanups.
d. Funding of "orphan sites" • The proposed changes are consistent with the Canadian Council of Resource and Environment Ministers (CCREM) proposal to provide a national contingency fund to clean-up "orphan sites". • enable use of the provincial contingency fund for rehabilitation of orphan sites.	An orphan site is described as a site where a responsible party cannot be identified, or is known or pursued by the law, is unable to pay the required rehabilitation costs and which pose a serious threat to public health or the environment.
e. Additional enforcement provisions for consideration • hold officers of corporations personally liable • provide for compensation to adjacent property owners for costs and expenses associated with clean-up and loss/damages (including loss of property value) attributable to physical damage of their property. • provide the authority to obtain an injunction against parties where the necessary approvals are not obtained prior to development. • establish substantial penalties for falsifying information or evading requirements at any stage in the process.	The Ministry should develop criteria for applicable properties. The Ministry should establish fines and penalties.

Broadening the Scope of Legislative Authority

Our first proposals respecting needed changes to the current regulatory framework relate to broadening the existing authority of the Ministry to deal with historically contaminated sites.

1. *Amend the Waste Management Act to require the mandatory review of industrial establishments.*

We recommend amending the Waste Management Act to include a provision placing a statutory prohibition on the future use of "industrial establishments" unless the property has been approved or certified by the province.

This amendment would limit the use of former waste disposal sites unless approval for the use is given by the Ministry. The provision would potentially require review and approval before reuse of all sites receiving fill material from contaminated sites, of all municipal, industrial and demolition landfill sites, and of industrial sites which have had on site disposal of wastes. This approach is similar to the approach used by Ontario.

"Industrial establishments" should be defined in the Act or regulations; the definition should include any establishment engaged in stipulated types of operations, incorporating by reference a listing of SIC categories, and any other specified categories of industrial properties or operations where historical use gives rise to possible contamination.

"Use" could also be broadly defined in the Act or regulations to include renovation or expansion of a facility, as well as a change from industrial to commercial and/or residential use.

2. *Amend the Waste Management Act to provide the authority to require assessment of sites where the Ministry has reason to believe that the site is contaminated.*

The authority to require assessment and remediation of the site should be conditional on a reasonable belief on the part of the Ministry official exercising the power that the site is contaminated and poses a potential hazard or risk to human health or the environment.

"Reasonable belief" would arise where there is information about historical activities on the site or other information about the site which leads the Ministry to suspect that the site is contaminated.

3. *Amend the Waste Management Act to provide authority to regulate the transportation, storing and disposal of soil and groundwater from a contaminated site.*

The enabling legislative should provide for a permit/approval process for removal and disposal of excavated material originating from a site which is found to be contaminated.

Delegation of Authority

Our second proposal relates to the way in which provincial requirements respecting assessment and remediation are delivered.

4. *Amend the Waste Management Act to permit the delegation of administrative authority to a local government.*

The Waste Management Act currently delegates authority over air discharges to the Greater Vancouver Regional District. While this is one possible legislative approach to the question of managing contaminated sites in certain municipalities, because of the size and complexity of site assessments and remediations, we feel that delegation on a case-by-case basis is desirable.

One method of delegating administrative functions to a local government official would be to stipulate in the legislation that specified approvals and certifications be given by "an official designated by the Minister". This wording would permit the delegation of authority of specified functions to a municipal official on a case-by-case basis, where this is mutually agreed to by the Ministry and the municipality in question. This wording would also limit the kinds of power delegated to the municipality. In particular, the ability to enforce provincial requirements should be reserved to provincial officials.

This recommendation may require consequential amendments to the Municipal Act and to local by-laws in order to permit local government officials to exercise powers delegated to them.

Mandatory Process Requirements

Our third set of proposed legislative changes relate to the the duties and powers viewed as desirable support for the proposed process for managing contaminated sites.

5. ***Amend the Waste Management Act and regulations to clarify obligations on owners and operators during the assessment and remediation process.***

During the assessment and remediation of contaminated sites, owners or developers should be required to: (i) disclose and submit the information which forms the basis of the initial evaluation; (ii) prepare and submit a public communications plan; (iii) conduct the preliminary assessment, including preparing and implementing a detailed investigation plan involving such aspects as drilling, laboratory analyses, etc.; (iv) develop and implement a remediation plan; and (v) submit a final report demonstrating compliance with clean-up objectives. Specific detail about each requirement should be set out in regulations under the Act, or in Ministry guidelines and policy.

The imposition of these legal requirements presuppose the existence of criteria respecting the assessment and remediation of these sites. Policy initiatives in this area will have to be substantially complete prior to the enactment of a regulatory regime which incorporates these criteria by reference into the scheme of approvals and certifications.

6. ***Amend the Waste Management Act and regulations to provide a clear legal mandate to government officials to take action at each stage in the assessment and remediation process.***

The legislation should provide authority to officials to: (i) issue the letter of non-applicability during the initial evaluation; (ii) approve the remediation plan subject to any changes and requirements that the official considers necessary, including the posting of financial guarantees that the work will be completed satisfactorily; and (iii) issue the certificate of compliance at the conclusion of the process.

Letters of non-applicability and certifications should relate to the question of whether the site complies with existing provincial standards respecting soil quality. Standard formats for these documents should be set out in regulations.

The enabling legislation should also provide the authority to make the certification conditional on posting financial security or on-going monitoring to ensure the long term care and maintenance of the site.

Strengthening Enforcement Provisions

Our fourth set of recommendations respecting needed changes to the legislative scheme relate to the need to provide an effective means of enforcing provincial requirements in relation to historically contaminated sites.

> 7. ***Owners and operators, both past and present, should be liable under the new scheme to comply with orders issued by the Ministry requiring the assessment and remediation of historically contaminated sites.***

We feel that the first priority of the process should be on cleaning up the site. Past and present owners and operators of the site should be required to comply with all Ministry requirements to remediate the site, particularly where a change of use is contemplated. This proposal involves specifically extending the application of section 22 to persons responsible for the historically contaminated site. Under this scheme, the responsible party includes current owners or operators of a site, as well as past owners and operators at the time of the release or disposal of the substance which contaminates the site. This approach is conditional on the availability of financial indemnification to owners and operators in specified circumstances.

Where there are a number of parties, the Act should specifically provide the authority to order one of the parties to assess and remediate the site, with the other parties to bear the costs.

The Act should also be amended to permit site access by former owners/operators to carry out a cleanup order.

8. ***Amend the Waste Management Act to provide for fines and court orders as penalties for default on an order to take action.***

Failure to comply with an order to take action exposes the party to liability for a statutory offence. Penalties upon conviction should include fines and the option of requesting the court to order the person in question to take action. Failure to comply with a court order would be contempt of court and could be enforced as such.

9. ***Amend the Waste Management Act to permit the Ministry to take direct action to rehabilitate a site , and to recover reasonable costs involved in the clean-up from responsible parties.***

The Ministry should have the authority to take direct action on a site where responsible parties default on a cleanup order, or where the site can be characterized as an orphan site, that is, no responsible party can be found. The Ministry should have the authority to retain an independent consultant to conduct tests and prepare a remediation plan. The authority to take direct remediation action in these instances should be limited to situations where the site poses a serious threat to public health and the environment.

Section 21 of the Waste Management Act should be amended to permit entry to a site for the purposes of assessment and remediation. The amendment should contain similar language as in the Environment Management Act or section 10 of the Waste Management Act in order to permit court review of costs in the event that costs are felt to be excessive by the responsible party.

Where more than one person defaults on the order and the Ministry takes direct action and sues to recover its costs against responsible parties, the Ministry may wish to have the authority to enter into financial settlements with parties who share only a minor responsibility for the contamination. The criteria for settlement should be set out in regulations under the Waste Management Act.

10. ***Liability for the costs incurred by government agencies in remediating a contaminated site should be on the basis of strict liability.***

We feel explicitly setting strict liability as the basis of civil liability regarding the remediation of historically contaminated sites in the legislation codifies the policy considerations underlying the common law tort of fraud.[25]

Our proposal imposes civil liability on past owners who knew of the existence of the site and failed to disclose it to the purchaser. In this way past owners will be liable for clean-up costs where they know of the existence of the contamination and did not exercise all due diligence in the long term care and maintenance of the site. Our proposal also imposes civil liability on current owners who fail to exercise all due diligence in ascertaining the existence of contamination on the site prior to the purchase of the property, and who fail to exercise due diligence to prevent the release of a hazardous substance.

Our proposal is that the law should not protect owners who were not prudent in making their purchase; nor should it protect vendors who unfairly transferred their responsibility to another. Buyers who purchase without inquiring into the possibility of contamination and have not investigated the site are not likely to prevail on either a count of fraud or under the proposed scheme.

11. *Amend the Waste Management Act to provide for partial or full indemnification of costs incurred in the assessment and remediation of contaminated sites.*

Where a person receiving an order under the Waste Management Act is likely to suffer financial loss or damage which he cannot reasonably be expected to bear either wholly or in part, and where indemnification has not or cannot be provided by any other means, enabling legislation is required to provide discretionary power to indemnify these parties. For instance, where the responsible party is no longer in legal existence or no longer solvent, rendering indemnification impractical, a party remediating the site should be entitled to seek indemnification from the government requiring the assessment and remediation.

In order to encourage voluntary rehabilitation of sites in appropriate circumstances, the Ministry may wish to have the discretion to offer partial contribution of costs.

Implementing this recommendation will provide a mechanism for designation of

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[25] The courts have acknowledged that under certain circumstances vendors may be liable to their buyers for non-disclosure of material information about the property. Common law fraud continues to be a cause of action available to the innocent purchaser of a contaminated site against his predecessor.

"orphan sites" and joint participation in the costs of cleanup.

12. *Amend the Waste Management Act to provide for provincial funds for the assessment and remediation of "orphan sites".*

In recent communiques from the Canadian Council of Resource and Environment Ministers (CCREM) a proposal has been made to provide a national contingency fund for the clean-up of "orphan sites" which pose a serious threat to public health or the environment. An orphan site is described as a site "where a responsible party cannot be identified, or is known or pursued by the law, is unable to pay the required rehabilitation costs".

We feel our proposals are consistent with the approach that seems to be emerging on a national basis to dealing with historically contaminated sites. Provincial funds will be required to pay all or a portion of the costs of remediation where a responsible party cannot be found, or where imposing the entire costs of remediation on the responsible party is inappropriate in light of the party's ability to pay. This will arise either through an inability to recover the full costs of remediation following direct action by the Ministry, or where the party complying with a Ministry order has a claim to indemnification.

Amendments to section 33.1 of the Waste Management Act or enactment of specific contaminated sites funding provisions will be required to establish the necessary contingency fund. The Ministry may also wish to develop guidelines respecting the expenditure of these public funds. Clear guidance will be required on the circumstances which should justify government intervention in the sense of taking direct action, or in the sense of providing full or partial compensation.

13. *Amend the Waste Management Act to hold officers of a corporation liable for recovery of cleanup costs.*

This would involve extending the provisions of section 34(10) of the Waste Management Act, and would be useful particularly where the responsible party is a corporation that is no longer in legal existence. Where a local government acquires land through the non-payment of taxes or by other statutory means, the Act should provide specific exemption to the officers of the municipal corporation.

14. ***Amend the Waste Management Act to provide a mechanism for application for and evaluation of conditions where compensation to adjacent property owners for costs and expenses associated with clean-up and loss/damages attributable to physical damage of their property might be appropriate.***

This recommendation is intended to provide a statutory process for compensation to adjoining property owners, with funds to be provided by parties responsible for the contaminated site, or in appropriate circumstances by government funds established for that purpose.The loss or damage referred to here could include loss of property value.

15. ***Amend the Waste Management Act to provide for injunctive relief.***

Where a person fails to obtain the necessary approvals prior to developing an "industrial property", the legislation should provide the authority to obtain an injunction against the individual. This would involve amendment to section 24 of the Waste Management Act. The person would also be subject to substantial penalties for failing to secure the necessary approvals prior to development.

16. **Amend the Waste Management Act to provide substantial penalties for falsifying information at any stage in the process.**

PHASE IN REQUIREMENTS

The model process and supporting legislation have been developed keeping in mind the comments of various individuals that we talked to during the course of this study. It should be kept in mind that the eventual selection of an appropriate process and legislative framework will require consultation with the various agencies who have an interest in the management of contaminated sites in this province.

It is also clear that a number of policy initiatives will have to be in place prior to the promulgation of legislation and regulations in this area. The development of provincial standard respecting soil assessment and remediation is critically important to the successful implementation of the proposed process for managing contaminated sites in the British Columbia. Chapter two identifies a number of provincial policy initiatives that should be considered prior to the introduction of legislation and supporting regulations. These include:

Clearly establishing the scope of sites routinely captured by the review process, to be reflected in legislation or supporting regulations.

Establishing a central and accessible data base. Municipalities may find it necessary to develop inventories of information required to trigger the process.

Establishing the sampling and analytical protocols to be reflected in regulations or guidelines.

Establishing the criteria for assessment and remediation of sites to be reflected in regulations or guidelines. Consider the necessity of establishing standards for assessing impacts on public health as well as impacts on the environment. Discussion with the Ministry of Health will be required.

Consider the necessity of establishing workplace safety standards governing assessment and remediation work on sites. Discussions with appropriate Ministries will be required.

Initiate discussions with municipal officials interested in exercising delegated power to determine the appropriate scope of the delegation. Consultation with the Ministry of Municipal Affairs will also be required.

Consider the necessity of licencing professional consultants.

Develop regulations or guidelines outlining public information requirements and involvement in the process.

Identify and secure funds for cleanup of contaminated sites, and develop procedures for public access to these funds. This will involve discussions with appropriate Ministries.

Appendix A:

LEGAL AUTHORITY AND ADMINISTRATIVE PRACTICE

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LEGAL AUTHORITY AND ADMINISTRATIVE PRACTICE

In British Columbia, environmental matters are primarily the responsibility of the provincial Ministry of Environment. However, both the federal government and local governments have an interest in these issues and play important roles in the regulation of environmental quality. The management of contaminated sites in the province illustrates this interaction between various levels of government.

In general, approvals in British Columbia as to the use of a particular site are regulated at the municipal level. It is at this stage that contamination arising from historical use of the property is usually detected. The extent of provincial and federal involvement in historical site assessment and remediation depends for the most part on the particular circumstances of the case, since in many cases these agencies do not currently have a clear mandate to take action.

This Appendix describes the source of authority over contaminated sites within the province, and outlines the various existing legal requirements governing contaminated sites management in the province. The current process, including the role played by each agency in the process, is also described.

Constitutional Jurisdiction Over Management of Contaminated Sites

The province derives its authority to regulate contaminated sites from its jurisdiction over public health and safety, over protection of the environment, and from its broad powers to regulate and control land development.

In general, the provinces have primary authority for the regulation of environmental quality and land development within the province. This authority stems from the power to regulate local works and undertakings and any matter of local or private concern assigned to the provinces by section 92 of the Constitution Act, 1982. In addition, the Constitution assigns to the provinces ownership of and control over the timber and mineral resources on crown land.

The B.C. government has used these powers to introduce resource management legislation, such as the Forest Act, R.S.B.C. 1979, c. 140 and the Mines Act, S.B.C. 1980, c. 28, as well as a variety of specific environmental statutes, including the Waste Management Act, S.B.C. 1982, c. 41, which deals generally with the disposal of wastes within the province, including "special" or hazardous wastes; the Pesticide Control Act, R.S.B.C. 1979, c. 322, which regulates the use of pesticides within the province; the Water Act, R.S.B.C. 1979, c.429, which regulates use and diversion of water within the province; and the Environment Management Act, S.B.C. 1981, c.14, which allows the province to deal with environmental emergencies and sets up the Environmental Appeal Board for appeals against the issuance of water, pesticide and pollution control permits.

The province has also used its powers to enact legislation designed to control development of the lands , such as the Land Title Act, R.S.B.C. 1979, c.219, which regulates any direct dealings with land at the subdivision stage; and the Municipal Act, R.S.B.C. 1979, c.290, which provides enabling authority to municipalities to enact by-laws on a wide range of subjects that effect planning and development of local lands.

The province also regulates public health and safety through such statutes as the Health Act, R.S.B.C. 1979, c. 161, and the Workmen's Compensation Act.

Although the province appears to have complete authority to regulate environmental quality, the federal government does have a number of powers and areas of jurisdiction that directly affect environmental regulation in important ways. Federal involvement in environmental regulation has been justified under the power to regulate seacoast and inland fisheries and interprovincial and international trade and commerce, as well as the general power to regulate for the "peace, order, and good government", assigned to the federal government by section 91 of the Constitution Act, 1982.

Pursuant to these powers, the federal government has enacted the Fisheries Act, R.S. C. 1985, c. F-14, which regulates water quality and quantity for the purposes of protecting the fisheries resource; the Pest Control Products Act, R.S.C. 1985, c. P-10, which regulates the import and sale of pesticides within Canada; and the Canadian Environmental Protection Act, R.S.C. 1988, c. 22 which provides authority for control over toxic substances through their entire life cycle, deals with nutrients which impair the use of water, contains provisions respecting controlling sources of air pollution where that air pollution has international implications, and deals with marine pollution.

Legislative Framework for Managing Contaminated Sites

The provincial and federal governments have enacted various laws to protect the environment. These statutes impose liabilities for pollution emanating from contaminated lands, and restrictions on its use and development. The province has also enacted a number of statutes which enable local governments to control the development and use of lands within the province. Together these various federal and provincial statutes provide the current legal authority to manage contaminated sites within the province.

1. Provincial Legislative Requirements

The Ministry of Environment relies primarily on the provisions of the Waste Management Act, S.B.C. 1982, c.41, and the Environment Management Act , S.B.C. 1981, c. 14 , for its authority over the management of contaminated sites within the province.

The Waste Management Act currently provides the primary authority to deal with contaminated sites in the province.

The Act imposes special requirements on the management of "special wastes". Section 3.1 requires every person who produces, stores, transports, handles, treats, deals with, processes or owns a special waste to keep the special waste confined in accordance with the regulations. Under section 3.2 of the Act, the construction, establishment, alteration, enlargement, use or operation of any facility for treatment, recycling, storage, disposal or destruction of special waste requires a permit, approval, order, or waste management plan; sections 4 and 5 provide the authority to regulate the transportation, storage and disposal of special waste.

The Special Waste Regulation, B.C. Reg. 63/88, introduced in 1988, contains the principle siting, performance and operating standards for special waste facilities as well as defining the administrative requirements for transporting, storing and disposing of special waste.

"Special waste" is defined in the Regulation to include dangerous goods that are no longer used for their original purpose and that are recyclable or intended for treatment or disposal, waste oil, waste asbestos, waste pest control product containers and wastes containing pest control products, and leachable wastes.

Where the contamination can not be classified as a "special waste", the Ministry relies on the general provisions of the Waste Management Act to support provincial requirements regarding remediation of contaminated sites. The Act provides the legislative authority to deal with all discharges of waste to the environment. "Waste" includes air contaminants, litter, effluent, refuse, special wastes and any other substance designated by the Lieutenant Governor in Council whether or not the waste has any commercial value or is capable of being used for a useful purpose.

Under section 3 of the Waste Management Act, the introduction of waste into the environment requires a permit, approval, order or waste management plan. The introduction of waste is defined to mean "depositing the waste on or in or allowing or causing the waste to flow or seep on or into any land or water or allowing or causing the waste to be emitted into the air". Where "special waste" is released from the required confinement, it is deemed to have been introduced into the environment unless authorized by a permit, approval, order, waste management plan or the regulations

Section 8 of the Act provides for the issuance of a permit to introduce waste into the environment or to store special waste. Structural and operational conditions may be attached to the permit; as well, the permit may be conditional on the permittee giving security in the amount and form and subject to the conditions that the manager issuing the permit specifies. Through this permitting process, some discharges will be prohibited entirely and some will be allowed at regulated levels.

When waste or pollution escapes or threatens to escape into the environment without a permit or in non-compliance with a permit, then the Act provides a scheme of offences, penalties and Ministry orders.

The Ministry relies on two sections of the Waste Management Act to enforce remediation of contaminated sites. Section 10(2) of the Act authorizes the Minister, where he considers it "reasonable and necessary to lessen the risk of an escape or spill", to order a person who has "possession, charge or control" of a polluting substance to "construct, alter or acquire at the person's expense any works, or carry out at the person's expense any measures that the Minister considers reasonable and necessary to prevent or abate an escape or spill of the substance." In this section "polluting substance" is defined to mean "...any substance, whether gaseous, liquid or solid, that could, in the opinion on the minister, substantially impair the usefulness of land, water or air if it were to escape into the air, or were spilled on or were to escape onto any land or into any body of water."

Where the contaminated site is actually "causing pollution", a manager may under section 22 of the Act "...order the person who had possession, charge or control of the substance at the time it escaped or was emitted, spilled, dumped, discharged, abandoned or introduced into the environment....", or any other person who caused or authorized the pollution, to abate the pollution. Section 1 of the Act defines "pollution" to mean: "...the presence in the environment of substances or contaminants that substantially alter or impair the usefulness of the environment;" the term "environment" is defined to include air, land and water.

Section 24 provides that where a person carrying on an activity or operation contravenes sections 3, 4 or 5 of the Act, the activity or operation may be restrained by a proceeding brought by the Minister in the supreme Court in addition to the imposition of any other penalty.

Section 34 establishes a number of offences and maximum penalties ranging from $2,000 to $1,000,000, and 6 months imprisonment. Failure to comply with the terms and requirements of a permit or approval is an offence and the holder of the permit is liable to a maximum penalty of $1,000,000. Failure to comply with an order or requirement made or imposed under the statute may result in a similar penalty. Each day that an offence continues constitutes a separate offence.

The Ministry of Environment also relies on the Environment Management Act for authority over contaminated sites. Under section 5 of the Act, where the Minister of the Environment considers that an environmental emergency exists and immediate action is necessary to prevent, lessen or control any hazard that the emergency presents, he may declare an environmental emergency and order any person to provide labour, services, material, equipment or facilities or to allow the use of land for the purpose of preventing, lessening or controlling the hazard presented by the emergency.

The Act defines "environmental emergency" in section 1(1) to mean an occurrence or natural disaster that affects the environment and includes a flood, a landslide, and "...a spill or leakage of oil or of a poisonous or dangerous substance."

Under section 6 of the Environment Management Act, the Minister of the Environment may certify that money is required for immediate response to an environmental emergency. This money may be paid out of the consolidated fund, and is a "...debt due to the government recoverable...from the person whose act or neglect caused or who authorized the events that caused the environmental emergency in proportions the court determines" pursuant to section 6(3).

In addition, section 4 of the Act allows the Minister to declare in writing that an existing or proposed work, or undertaking, or product use or resource use has or potentially has a detrimental environmental impact. Having made such a declaration, the Minister may then make an interim environmental protection order restricting, modifying or prohibiting operation of the work or undertaking, or the use of the product or resource. These interim orders may require the person affected to do anything specified in the order for a period not exceeding 15 days; the Lieutenant Governor in Council may also make such an order either permanently or for a specified period.

In addition to the requirements of provincial environmental statutes, the Health Act, R.S.B.C. 1979, c. 161, section 60, imposes a duty to report and a duty to take immediate action to prevent and cease discharge into the land, water or air of a substance that is injurious to the health, safety or comfort of a person. Such a discharge is deemed to be a nuisance. Under section 78 of the Act, the Minister of Health may cause the removal or abatement of the nuisance where the person responsible for the nuisance neglects or refuses to do so; under section 79 the Ministry can then seek recovery of reasonable costs and expenses incurred in the removal or abatement. Section 80 provides that an owner may seek indemnification for expenses incurred under section 79 from the occupier of the premises. Section 75 provides for the appointment of a person to report on the alleged nuisance and the necessity of removal or abatement where the action involves the expenditure or loss of a considerable sum of money or where any trade or industry is seriously interfered with.

Under section 68(2) of the Act, local boards also have the power to enforce the abatement of a nuisance and where the cost of cleaning premises which are found to be in a filthy or unclean state is assumed by the Crown, the cost is charged to the "owner or "occupant" and the Crown is given the right to recover the cost as a debt due to the Crown.

Section 122 of the Health Act also prohibits establishing, without the consent of the local health board, a noxious or offensive trade, business or factory or one that may become offensive. The Act provides the authority to regulate the method of carrying on all noxious or offensive trades or businesses, and the summary abatement off any nuisance or injury to the public health that arises or any arise therefrom, the prevention of pollution, defilement, discoloration or fouling of all lakes, streams, pools, springs and waters, and generally all matters, acts and things necessary for the protection of the public health.

2. Municipal Legislative Requirements

Development control and requirements for planning approvals and building permits enable those with approval powers, particularly local governments, to impose obligations as a condition of the development. These obligations may require clean-up as a prerequisite to development. Such obligations are often embodied in agreements with the municipality secured by performance bonds or letters of credit and registered against title.

The B.C. Municipal Act, R.S.B.C. 1979, c. 290, sets out the powers and duties of all municipalities in the province except Vancouver. Vancouver is governed by the Vancouver Charter, S.B.C. 1953, c.55, the provisions of which are largely similar to those of the Municipal Act, particularly in the environmental field.

The Municipal Act establishes the legislative framework in which municipalities are incorporated, and defines the scope of their authority. Section 932 of the Act gives local governments the power to pass bylaws to prevent, abate and prohibit nuisances, and to provide for the recovery of the costs of abatement of nuisances from the person causing the nuisance or other persons described in the bylaw. Section 936 gives the municipal council the authority to declare any building or structure, any water course or any other thing upon any private lands a nuisance and order that it be removed or otherwise dealt with by its owner. If the owner fails to do so, the council may take steps to abate the nuisance on its own initiative.

While these provisions are similar to those contained in the provincial Health Act, the power to abate nuisances contained in the Municipal Act is not restricted to nuisances which endanger public health.

The Municipal Act also provides the authority to municipal councils to generally control the development of land within the municipality, and to deal with all aspects of the building and construction on these lands.

Section 734 of the Municipal Act provides that the municipality may "for the health, safety and protection of persons and property", and subject to the Health Act, regulate all aspects of the construction, alteration, repair or demolition of buildings and structures, including imposing a requirement to hold a building permit before commencing construction. Where the construction is on land subject to flooding or some other natural disaster, section 734(2) provides that a building inspector may require the owner of land to provide him with a report "that the land may be used safely for the use intended." The Act also provides local governments with the authority to establish building codes and regulations.

The Municipal Act and the Vancouver Charter also authorize local government officials to exercise delegated powers respecting the approval of subdivision plans. Section 83 et seq. of the provincial Land Titles Act, R.S.B.C. 1979, c. 219, provide for subdivision plan approval by an "approving officer". This approval power has been delegated to local governments; the approving officer is a designated municipal official.

Section 85(3) of the Land Title Act provides that the approving officer may refuse to approve the subdivision plan if he considers that the deposit of the plan is against the "public interest". In particular, section 86 (1)(c)(vi) gives the approving officer the discretion to refuse to approve the subdivision plan if after due consideration of "all available environmental impact and planning studies", the approving officer considers that the "anticipated development of the subdivision would adversely affect the natural environment to an unacceptable level".

Finally, section 692 of the Municipal Act gives local governments the general authority to regulate persons, their premises and their activities "to further the care, protection, promotion and preservation of the health of the inhabitants of the municipality", and to require a person remedy or remove the unsanitary conditions for which he is responsible or which exist on property owned, occupied or controlled by him. All regulations made by or contained in a bylaw are not valid until approved by the Minister of Health.

3. Federal Legislative Requirements

While the provinces have direct responsibility for all dealings with land within the province, the federal government has jurisdiction over a number of important subject areas which bear on the management of these lands. Accordingly, assessment and remediation of contaminated sites within the province is not only subject to the requirements of each provincial statute, but must also take into account federal requirements respecting the fisheries, ocean dumping and, more recently, the various information requirements and toxic substance release requirements being developed under the Canadian Environmental Protection Act. It should also be noted that where the land is owned and used by the federal Crown, the assessment and remediation of those lands would be the direct responsibility of the federal government.

The Canadian Environmental Protection Act, S.C. 1988, c. 22, ("CEPA") came into force

June 30, 1988. CEPA allows the federal Minister of Environment: (1) to control the introduction into Canadian commerce of substances that are new to Canada; (2) authority to obtain information on and to require testing of both new substances and substances already existing in Canadian commerce; (3) to control all aspects of the life cycle of toxic substances from their development, manufacture or importation, transport, distribution, storage and use, their release into the environment as emissions at various phases of their life cycle, and their ultimate disposal as waste; (4) to control sources of air pollution in Canada where a violation of an international agreement would otherwise result; and (5) to control nutrients which can interfere with the use of waters by humans, animals, fish or plants. The Act also allows the Minister to regulate emissions and effluents, as well as waste handling and disposal practices of federal departments, boards, agencies and Crown corporations.

In the context of managing contaminated sites, the most important provisions of CEPA are those that deal with the release of toxic substances. Section 36 states that where the release or threatened release of a toxic substance occurs, any person who owns or has charge of the substance, or who causes or contributes to the release must notify the public and the government, and take all reasonable measures to prevent the release and remedy any dangerous condition and reduce or mitigate any danger to the environment or human life or health. Section 36 also outlines a broad range of specific measures which must be undertaken by a person who owns or controls the toxic substance, or who causes or contributes to its release.

CEPA defines toxic substances in section 11 in the following manner: "a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions ... having or that may have an immediate or long-term harmful effect on the environment ... or that may constitute a danger to the environment on which human life depends ... or that may constitute a danger to human life or health."

Under sections 36(5) where a person fails to take any of these measures, an inspector may take them, or cause them to be taken or direct the parties referred to above to take them. Failure to comply with an inspector's direction is an offence under the Act.

Section 39(1) of CEPA provide that the Crown may recover the costs and expenses associated with taking any emergency actions from any "person who owns or has charge of the hazardous substance immediately before its initial release or, any person, to the extent of his or her negligence, who causes or contributes to the initial release." Liability is joint and several. It should be noted that the costs and expenses associated with the Crown taking emergency measures are only recoverable "to the extent they can be established to have been reasonably incurred in the circumstances" under section

39(2).

Section 136 of the Act creates a civil cause of action for any person who has suffered loss or damages as a result of conduct contrary to the Act. Section 122 provides for liability of directors, officers or agents of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence whether or not the corporation has been prosecuted.

The Fisheries Act, R.S.C. 1985, c. F-14, provides the authority to deal with activities and substances that harm the fisheries resource and supporting habitat. The primary provisions of the Act concerned with environmental liability are contained in sections 34 to 42. The Act prohibits "deleterious substances" and activities that result in harmful alteration, disruption or destruction of fish habitat, unless the substance or activity is authorized by the Minister.

Section 38 imposes a duty on owners or persons in control of a deleterious substance persons, who cause or contribute to the cause of a deposit or danger of deposit of the deleterious substance, to report such occurrence to federal authorities. The section requires the person to take reasonable measures consistent with safety and the conservation of fish to prevent an occurrence or to mitigate or remedy any adverse affect that results from the occurrence.

Section 38(6) authorizes an inspector to take remedial measures or direct that they be taken by a person who owns the deleterious substance or who causes or contributes to the deposit of a deleterious substance. Section 38(8) provides that any inspector or other person who intervenes to take remedial measures shall not be liable for loss or damage caused to others by such entry, access or action.

Offences and penalties are prescribed by section 40. Section 42 provides for the recovery of costs and expenses by the Crown reasonably incurred in taking measures to prevent any deposit or to counteract, mitigate or remedy any adverse effects that result or may reasonably be expected to result therefrom. Liability attaches to persons who own the deleterious substance or have charge, management or control, or are persons who cause or contribute to the deposit or danger. Section 42(3) provides for compensation to commercial fishermen where the loss is caused by the unauthorized deposit of a deleterious substance.

Role of Government Agencies in the Management of Contaminated Sites

The current approach to dealing with contaminated sites in the province is characterized by site specific procedures and requirements. Parties to the process vary from case to case, with involvement often dictated by the complexity and public profile of the case.

Parties to the contaminated sites management process in British Columbia can potentially include over a dozen different provincial, federal and municipal agencies and departments, as well as private consultants, individual members of the public and private interest groups, and the media.

The participation and extent of involvement of each of these agencies and parties has generally been determined by specific circumstances. It is widely acknowledged and desired that the Ministry of the Environment should play a central role in the management of contaminated sites, and the Ministry has generally been the guiding agency in managing most contaminated site situations in British Columbia. The involvement of other agencies has varied considerably in scope and degree.

In some situations, the Ministry has worked directly with site owners to establish assessment and remediation requirements. Involvement of other agencies is limited and there is little or no public involvement. As an example, systematic plans for remediating and upgrading leaking underground storage tanks have been developed between the Ministry and various oil companies.

In contrast, a few high profile and complex situations have resulted in a task force approach to contaminated sites management. The most notable example is the cleanup of the Pacific Place site. This process for assessing and remediating this site has involved numerous agencies at all levels of government and there has been extensive publicity and public involvement in the overall site management process process.

In reviewing the current situation for managing contaminated sites, it is useful to consider the following general categories of activities:

- initiation
- assessment
- remediation
- verification
- certification

1. Initiation

Specific triggers for initiating agency involvement in contaminated sites management are not currently defined in legislation. However, the following situations encompass most situations which currently result in the identification of problem sites:

At the municipal level :
Many problem sites are currently identified at the municipal level. Principal mechanisms include:

a. Development/rezoning applications.
Land development within municipal jurisdictions must comply with established municipal approvals procedures for activities including rezoning, subdivision, preliminary plan approval, sign approval, and business licensing.

b. Applications for permits to removal of soil.
Municipal by-laws normally require the issuance of a permit for the removal of soil at a site .

c. Verification of compliance with permits for operating landfills.
Municipalities operating landfills may request assurance that materials to be deposited do not contain special wastes (as defined by the Special Waste Regulation) and are in compliance with the operating permit for the landfill (issued by the Ministry). This has led to referrals to the Ministry to verify that the materials did not originate from a contaminated site.

c. Complaints.
Municipal authorities occasionally receive complaints or third party notification of current or past activities which have resulted in contaminated sites.

At the provincial level:
Many additional problem sites are identified through the routine activities of the Ministry of the Environment. These activities include:

d. Issuance/maintenance of pollutant discharge permits.
The mandated activities of the Ministry include the issuance of permits for discharges or release of substances to air, water or soil by industrial activities and processes.

Assessments required in the process for reviewing and issuing permits may identify site contamination.

e. Decommissioning of industrial facilities.
Facilities which are closed or dismantled may come to the attention of of the Ministry. Potential contamination of the site may be indicated by known site activities, although the ability of the Ministry to require assessment (in the absence of knowledge of known release) is limited to voluntary compliance by the site owner.

f. Complaints.
Ministry authorities occasionally receive complaints or third party notification of current or past activities which have resulted in contaminated sites.

The record of information associated with the identification of contaminated sites is informal and dispersed. There is no centralized record-keeping for information about potentially contaminated sites, nor are there established procedures for inter-agency access to and sharing of information. Municipal records on site use vary widely in scope and degree of documentation. In many cases there is strong reliance on "oral history" expressed by long-time employees; in other cases, municipalities have made a systematic effort to gather historical and technical information associated with contaminated sites.

Following identification of a problem site, the specific site management process which unfolds is usually shaped by the nature of the triggering process. However, the principal elements and interactions are illustrated by the typical process for managing a contaminated site discovered as a result of an application for municipal development approvals. Table A.1 illustrates the sequence of events and interactions in a typical case involving a municipality and the Ministry of Environment.

Initiation results when the review of an application for development approval suggests that contamination may be present on a site. If contamination is suspected or known, the development will be placed on hold (pending assessment) or the rezoning application may be made contingent upon assessment and remediation (as required). The municipality may directly request the assistance of the Ministry in assessing the problem, or the owner/developer may be directed to request Ministry assistance. The owner's representative or consultant then contacts the Ministry to determine the need and requirements for a site assessment.

The involvement of other agencies is decided on a case-by-case basis. In most instances,

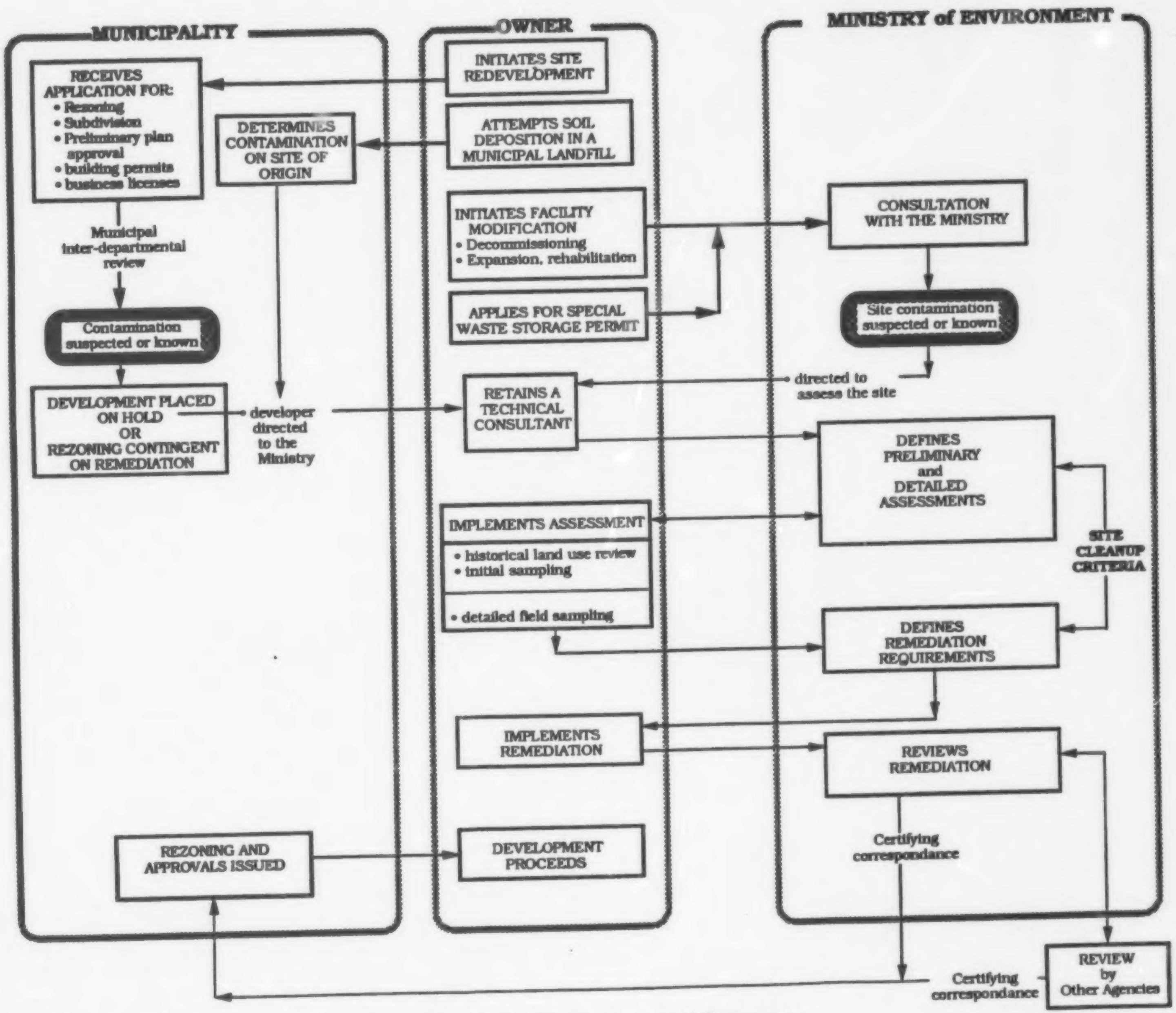
MUNICIPALITY
OWNER
MINISTRY of ENVIRONMENT
INITIATES SITE REDEVELOPMENT
RECEIVES APPLICATION FOR:
• Rezoning
• Subdivision
• Preliminary plan approval
• building permits
• business licenses
ATTEMPTS SOIL DEPOSITION IN A MUNICIPAL LANDFILL
DETERMINES CONTAMINATION ON SITE OF ORIGIN
INITIATES FACILITY MODIFICATION
• Decommissioning
• Expansion, rehabilitation
CONSULTATION WITH THE MINISTRY
Municipal inter-departmental review
APPLIES FOR SPECIAL WASTE STORAGE PERMIT
Contamination suspected or known
Site contamination suspected or known
directed to assess the site
DEVELOPMENT PLACED ON HOLD OR REZONING CONTINGENT ON REMEDIATION
developer directed to the Ministry
RETAINS A TECHNICAL CONSULTANT
DEFINES PRELIMINARY and DETAILED ASSESSMENTS
IMPLEMENTS ASSESSMENT
• historical land use review
• initial sampling
• detailed field sampling
SITE CLEANUP CRITERIA
DEFINES REMEDIATION REQUIREMENTS
IMPLEMENTS REMEDIATION
REVIEWS REMEDIATION
Certifying correspondance
REZONING AND APPROVALS ISSUED
DEVELOPMENT PROCEEDS
Certifying correspondance
REVIEW by Other Agencies

Figure A.1: Current Contaminated Sites Management Process

other agencies are involved through review at key stages of the assessment and remediation process. In complex cases (and/or where other jurisdictions have direct authority) other agencies may participate directly in the process through the establishment of a guiding task force (normally chaired by the Ministry).

2. Assessment

The Ministry normally defines requirements for a preliminary assessment consisting of:

- compilation of a site history (to identify potential contaminants and contaminated areas),
- initial site inspection and sampling, and
- reporting.

The Ministry has not yet formalized detailed criteria for site cleanups, although criteria have been published for the Pacific Place site, and these and other criteria, largely developed in other jurisdictions, are used to guide the site evaluation. If indicated by the preliminary assessment, a detailed site sampling and assessment program is formulated and implemented by the owner, after approval by the Ministry. This program is intended to define the nature and degree of contamination, to assess the potential and known impacts of the contamination (both currently and also under the circumstances of proposed use), and to determine options for remediation of the site.

3. Remediation

A remediation program is determined on the basis of the detailed assessment, considering the nature and degree of contamination, and potential impacts in the context of the proposed land use. The Ministry does not have a formal policy for selecting remediation options, and remediation actions are determined on a case-by-case basis.

4. Verification

Following completion of the remediation program, the Ministry will require sampling, assessment and reporting to verify and document that the cleanup was satisfactory.

5. Certification

Existing legislation provides no formal mechanism for the Ministry to "certify" that sites have been satisfactorily remediated. As a consequence, the Ministry currently limits "certification" to correspondence stating that the site was adequately assessed and that the cleanup meets current standards, regulations and guidelines.

The final remediation report may be reviewed by other agencies, and in some circumstances these agencies may also issue certifying correspondence verifying that the cleanup meets their requirements.

At this stage, the owner/developer continues with the process for obtaining municipal approvals and proceeding with the development of the land.

Appendix B:

SUMMARY OF PRINCIPLES GOVERNING GOVERNMENT LIABILITY

The extent of liability incurred by a public authority for its actions in managing contaminated sites is determined by the legislation under which he purports to act. Liability for failure to act may arise where the statute places a duty on officials to do certain things.[1] For instance, if a statute states that an official 'shall conduct an inspection', the failure to do so exposes the public authority to potential liability. More frequently the wording of the statute is permissive. In these situations liability arises where the courts are able to infer a private law duty of care.

For many years it was accepted that a public authority had no duty and hence no potential for liability in the absence of the creation of independent damage.[2] This rule was altered dramatically in 1970 by an English decision in which potential liability upon the local authority was imposed for damage done by escaping juvenile offenders.[3] Two years later another English court imposed liability upon a local authority for a negligent building inspection.[4]

The next major development in this area of expanding liability was Anns v. Merton London Borough Council (1978) A.C. 728, which stated that there were circumstances in which a private law duty of care could be imposed above or alongside the public law duty, enabling citizens to sue the public authority for damages in a civil suit.

The leading case in Canada is the Supreme Court of Canada decision in The City of Kamloops v. Nielsen et al (1984) 10 D.L.R. (4th) 641(S.C.C.). This case concerned inspection and approval of building foundations in residential construction. The City of Kamloops had statutory power to enact by-laws regulating construction and had enacted by-laws in this area. The by-law imposed a duty on building inspectors to enforce the provisions of that by-law. At the time the house was built, the foundations were not within the specifications required by the building by-law. The City had notice of the deficiency, but was persuaded by the owner to take no action and approve the building. A subsequent purchaser of the property suffered loss when the building subsided due to the defective foundations and sued the city in negligence.

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[1] It should be noted that the legislative and quasi-judicial actions of a public authority are generally immune from civil liability.

[2] For further detail see: Union of B.C. Municipalities, Papers on Local Government Liability: Negligence Vol 2. (April 25, 1985).

[3] Home Office v. Dorset Yacht Company (1970) A.C. 1004.

[4] Dutton v. Bognor Regis (1972) 1 Q.B. 373. The facts of the case on which liability was based were that the inspector had conducted an inspection but had missed the fact that the house had inadequate foundations for its site on an old garbage dump.

The court adopted the two-step test set out in the Anns case to establish whether a private law duty of care existed. First, it must be established that an authority's powers and duties require it to make an operational as opposed to a policy decision. Then, two questions must be asked: (1) Is there a sufficiently close relationship between the parties so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to the person? and (2) Are there any considerations which ought to limit the scope of the duty or the class of persons to whom it is owed?

The distinction between policy and operational decisions is critical but difficult one. Essentially, policy decisions are those that can be characterized as falling under the authority's "discretion", whereas operational decisions, although they often consist of an element of discretion, are generally those decisions of a more operational or administrative nature.[5] Or to describe it another way, a policy decision is a decision which involves the allocation of scarce resources, while an operational decision involves carrying out the policy. Mr. Justice Wilson for the majority in the Kamloops case held that the City inspector was called to make an operational decision. The inspector had no discretion to not enforce the by-laws in existence, however he did have discretion as to how to enforce them. The court further found the City's breach of duty was a cause of the damage notwithstanding the fact that the builder's negligence was primary.[6]

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[5] Anns was considered in Canada in the case of Barratt v. District of North Vancouver (1981) 13 M.P.L.R. 116. Here the court concluded that the conduct which was the basis of the allegation of negligence was a policy and not an operational decision since the District had discretion as to its system of inspection: "Its method of exercising its power was a matter of policy to be determined by the municipality itself. If, in the implementation of its policy its servants acted negligently, causing damage, liability could arise, but the municipality cannot be held to be negligent because it formulated one policy of operation rather than another." See also Just v. British Columbia (Government) where it was held that the number and quality of road inspections as well as the frequency of remedial work were matters of planning and policy, involving the utilization of scarce resources and the balancing of needs and priorities throughout the province. (Just is presently under appeal to the Supreme Court of Canada)

[6] The City was found to be 25% liable for the resulting damages in this case.

The policy versus operational distinction has become the threshold test in the law of liability of public authorities. In essence, government bodies regulating any aspect of the use of land must exercise due diligence to ensure that the contamination is remediated such that the risks posed to health or the environment fall within acceptable limits.

In issuing provincial approvals and permits under the Waste Management Act, provincial officials are entitled to rely on section 13 of the Environment Management Act which states that: "No action may be brought against the board, a panel or any person for anything done or omitted in good faith in the performance or intended performance of a power conferred or a duty imposed under this Act or any other enactment administered by the Minister."

The liability of local governments for their subdivision and development approvals has been canvassed in a number of recent articles.[7] While it is beyond the scope of this report to examine these issues in great detail, a number of points should be made. The subdivision approval process, set out in the Land Title Act, places no express duties on the approving officer beyond those relating to the way in which he exercises his discretion to refuse the subdivision plan. Sections 85 and 86 of the Act which set out the grounds on which a subdivision plan may be refused are permissive, and do not impose a duty on the approving officer to refuse to approve in particular situations. Section 86(1)(c)(vi), described earlier in this report, does impose an operational duty on the approving officer to give due consideration to all studies available to him and then, make a reasonable decision as to whether the development would adversely affect the environment to an unacceptable level. If the City grants approval, with knowledge of the contamination, but relying in good faith on experts' certificates that the problem has been remediated, liability would not arise.

The development approval process is governed by the by-laws enacted by the local government. The actual wording of the by-law determines the extent to which the approving officer is required to consider the existence of soil contamination or the environmental safety of lands that are subject to an application for a development permit. It is common to find no express duty in the by-laws requiring officials to inquire into or satisfy themselves that the land subject to the development permit application is free of soil contamination. Given the broad range of discretion to refuse to grant a development permit, an official would not attract liability unless he exercises discretion *mala fides* or in bad faith.

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[7] See for instance: Donald M. Dalik "Site Remediation Considerations for Vendors and Purchasers of Real Estate" in Avoiding Environmental Liability in Real Estate and Business Transactions: Corporate Strategies for British Columbia and Alberta in the 1990's - The New Imperative (Vancouver: The Canadian Institute Conference Proceedings, March 17, 1989) Chapter G.

During the course of this study an issue raised frequently by the municipalities consulted related to the question of the need for legislation to limit liability of local governments and approving officers when they approve the development of sites where subsequent to the approval an unforeseen hazard such as toxic waste is discovered.

Our review of the common law suggests that it provides sufficient protection against liability when discretion is exercised pursuant to a statutory amendment and the exercise is bona fide. If an approving officer is careless or negligent in approving a site for development he will be liable.

The Municipal Act contains a number of provisions designed to expressly limit the liability of municipal public officers and the municipalities in general. Extending these limitation on liability provisions to the approval of sites for development may be consistent with this trend. However, two important considerations suggest that a recommendation to amen the Municipal Act in this fashion may be premature. First, the use of this type of provision will have a significant and negative impact on private property owner's rights to recover against a local government who acts carelessly and without regard to the consequences of those actions. Second, the courts are likely to construe any statutory limitation clause very narrowly if it directly interferes with a private property owner's rights to recover damages against a local government.

For these reasons, we are of the view that limitation clauses regarding the approval of sites are inappropriate at this time. It may, however, be necessary to review the current statutory mandate of various municipal officers and approving officers to clarify authority in each case. It is beyond the mandate of this study to make specific recommendations in this regard.

Appendix C:

Common Law Principles Governing Liability for Costs of Clean-up

A purchaser becomes an owner the moment the real estate transaction closes and as such takes on all the liabilities and responsibilities of ownership. The possible courses of action available to adjacent or neighbouring property owners or occupiers against owners of contaminated property includes nuisance, negligence, or strict liability under the rule in Rylands v. Fletcher. Liability presupposes the existence of a plaintiff who has suffered some injury or damage caused by the defendant property owner. This section looks at these possible causes of action and their applicability to owners who may not be the "author of the environmetnal damage".

NUISANCE

An action may lie in nuisance where there is an unreasonable interference with another's use or enjoyment of property. The interference referred to must be physical, including noise, smell, spills of toxic materials, vibrations or any other physical interference.

Nuisance can be either private or public. Where a neighbour's use and enjoyment of land is interfered with this is referred to as private nuisance. Where intereference is with the exercise of public rights, as for example, free passage on a highway, this is referred to as public nuisance.

The focus of nuisance is on the nature of the interference; consequently it is not necessary to prove that the defendant property owner acted unreasonably, only that there has been interference in the exercise of another's rights.

NEGLIGENCE

An action in negligence raises the issue of reasonableness of the conduct of the defendant. In general, negligence can be described as the lack of reasonable care on the part of a person where damage or injury to others is foreseeable.

In order to found the cause of action in negligence against a property owner, a plaintiff must establish the following: a) that the defendant owed him a duty of care[1]; b) that the defendant has breached that duty; c) that the actions of the defendant caused the damage suffered by the plaintiff[2]; and d) that actual loss or damage has been suffered by the plaintiff[3]. It should be noted that a cause of action in negligence may lie against a former property owner where other elements of negligence are met, unlike an action in nuisance where the cause of action runs with the land.

STRICT LIABILITY

A property owner is also strictly liable for harm or damages resulting from the escape from his lands of an inherently dangerous substance - negligence need not be proved in order to be compensated. This principle derives from the decision in Rylands v. Fletcher[4] and is based on the notion that the person who keeps a dangerous substance or thing on his property should bear the risk of loss if it escapes irrespective of fault.

Strict liability under the Rylands v. Fletcher rule does not depend on the toxicity of a substance - water has also been held to be inherently dangerous in certain circumstances.

REMEDIES

While it is clear that the property owner who keeps hazardous waste or contaminated soil on his property may be liable to others who are injured or suffered loss, there are limitations in the effectiveness of a common law remedy. Potential plaintiffs have been excluded from the courts for not having a property interest to defend, necessary for actions in private nuisance. Common law actions have also failed where plaintiff's have not suffered a special loss greater than that of the public at large. In order to sue in

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[1] The plaintiff must establish that the defendant was in a sufficiently close relationship with the plaintiff that, should he fail to exercise the required standard of care, it is reasonably foreseeable that the plaintiff would be injured by his conduct. The first important decision of the courts dealing with duty of care was the 1932 decision of the British House of Lords in Donoghue v. Stevenson (1932) A.C. 562. See also: Anns et al. v. London Borough of Merton (1977) 2 All E.R. 492 (House of Lords).

[2] This is referred to as establishing the causal relationship between the actions of the defendant and the damages suffered by the plaintiff.

[3] Damage for pure economic loss or loss that is not caused as a result of physical damage has not been allowed in negligence claims.

[4] (1868), L.R. (H.L.) 330.

nuisance, negligence or under the rule in Rylands v. Fletcher, a plaintiff must establish standing in the court. In general this means that he must have suffered loss or damage over and above what other members of the public have suffered. This can be a serious limitation to establishing a common law cause of action where all members of the community are at risk by a contaminated site. In limited circumstances, the rules of standing have been extended to include public interest standing where there is no other way that the matter can be brought before the courts.[5] The difficulty in establishing actual damages, particularly where the loss or damage is not physical but relates to health problems, defeats a number of causes of action otherwise available.

In addition, it is frequently difficult to establish causation where the full effect of a contaminated site may not be readily apparent. Chronic exposure to a contaminated site may cause damage over a long period of time.

INDEMNIFICATION

Where a current property owner faces potential liability for the remediation of a contaminated site, there are circumstances in which the current owner of the site may, in turn, have a claim against the previous owner of the site. The principle of *caveat emptor*, or buyer beware, means that the responsibility is on the purchaser of property to inspect and discover any defects in the property being purchased. In general, a vendor is not obliged to disclose defects in the property. However, where the defect relates to soil contamination the courts are prepared to make a number of important exceptions.

The courts have found that a vendor has a duty to disclose any "latent defects" relating to property. Latent defects are those that would not be revealed on reasonable inquiry by a purchaser. The duty arises where the vendor has knowledge of the latent defect, or the vendor is guilty of reckless disregard to their presence, that is he ought have known, and the latent defect either: a) renders the property unfit for habitation, or b) renders the property inherently dangerous.[6]

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[5] Thorson v. A.G. Canada , (1975) 1 S.C.R. 138; N.S. Bd. of Censors v. McNeil, (1976) 2 S.C.R. 265.

[6] See McGrath v. MacLean et al (1979), 95 D.L.R. (3rd) 145 (Ont. C.A.) where the court stated at page 151: "I am prepared to assume that, in an appropriate case, a vendor may be liable to a purchaser with respect to premises which are not new if he knows of a latent defect which renders the premises unfit for habitation.... (T)here is a duty on the vendor to disclose a latent defect which renders the premises dangerous in themselves, or that the circumstances are such as to disclose the likelihood of such danger e.g. the premises being sold being subject to radioactivity."

A fraudulent misrepresentation, or concealment of relevant facts, may also result in liability for the tort of deceit or in contract for misrepresentation.[7] The test for fraud is whether a statement or representation was made knowingly, or without belief in its truth, or recklessly careless concerning its truth. The purchaser may be entitled to damages as a remedy, or in certain cases to rescission of the contract.

Finally, if the presence of an undisclosed defect results in an "error in substantialibus", the court may grant recision of the contract to the purchaser. An error in substantialibus occurs where the purchaser receives something fundamentally different than what the contract calls for.

There may be practicable difficulties facing a purchaser in recovering damages for losses suffered as a result of contamination discovered on a property after closing the real estate transaction. The vendor must be legally accessible to the purchaser and must have assets for a lawsuit to be worthwhile. Where an individual vendor leaves the jurisdiction or where a corporate vendor has ceased its existence or disposed of its assets, judgment collection may be impossible.

Real estate agents may also be liable at common law to the purchaser of contaminated property. Both a vendor and his agent will be liable for deceit if they do not disclose latent defects of which they have knowledge and which render the property uninhabitable or dangerous. Further, if it is apparent the purchaser is relying on the agent to "make careful inquiries" and the agent does not ascertain the defects which were known to the vendor, then the agent may be liable in negligence to the purchaser for failure to obtain complete and accurate information about the property.[8]

In conclusion, owners of contaminated property may be liable for the costs of clean-up of soil contamination on their property, even if it was there prior to their acquisition of the property. Buyers and sellers of property must exercise due diligence to ensure that the degree of soil contamination, if any, is disclosed and known. Real estate agents are also potentially liable where they fail to fully inform themselves as to the nature of the property with which they are involved.

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[7] The law distinguishes between innocent misrepresentations and fraudulent misrepresentation. In general, damages will be awarded for the difference in value of the property for an innocent misrepresentation, whereas in the case of a fraudulent misrepresentation the whole contract may be set aside.

[8] It is not a defense to an action for an agent to say he acted on instructions from his principal.

The normal way for handling such matters with respect to private land would be for a purchaser to get a covenant from the vendor stipulating that the lands being purchased contain no environmental contamination or that they are suitable for a particular purpose. Such a covenant would then be actionable as against the vendor in the event that the facts indicated otherwise.

Appendix D:

ALTERNATIVE APPROACHES TO MANAGING CONTAMINATED SITES

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ALTERNATIVE LEGISLATIVE APPROACHES TO MANAGING CONTAMINATED SITES

During the past decade there has been an increased public concern over the danger posed by abandoned hazardous waste sites on this continent. Concern peaked sharply in 1978, when a state of emergency in Love Canal, a neighborhood in the State of New York, was declared. The area gained notoriety due to the health hazards posed by chemicals seeping from an abandoned hazardous waste site into the land on which area homes were located.

There have been important developments in recent years in Canadian and U.S. laws regulating hazardous waste, particularly the assessment and remediation of contaminated sites. Environmental statutes in Ontario and in the United States are dramatically restructuring the rules of liability and compensation in environmental matters. Many jurisdictions now have extensive policies in place guiding the management of contaminated sites.

This chapter looks at the policy development and legislative initiatives taking place in a number of other jurisdictions.

The United States: The Federal "Superfund" Law

Two years before the declaration of emergency at Love Canal, Congress enacted a system of "cradle to grave" regulation of hazardous waste called the Resource Conservation and Recovery Act (RCRA)[1]. This legislation was passed as amendments to the Solid Waste Disposal Act[2], and was designed to deal specifically with the regulation of land disposal of discarded materials and hazardous waste. Unfortunately , while RCRA addresses the problem of existing, operating waste disposal sites, it did not deal with problems associated with abandoned hazardous waste sites and left the U.S. Environmental Protection Agency (EPA) unable to respond quickly to the Love Canal situation.

The Comprehensive Environmental Response, Compensation and Liability Act[3]

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[1] Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. ss.6901-6991(i)(1982 & Supp. 1985).

[2] Pub. L. No. 89-272, 79 Stat. 992 (1965).

(CERCLA), also known as the "Superfund" law or program, was enacted by Congress in 1980 to provide the federal government with the mandate to remove or clean-up abandoned and inactive hazardous waste sites and to provide federal assistance in toxic emergencies. Congress made the Environmental Protection Agency (EPA) the lead agency in implementing CERCLA and created the Agency for Toxic Substances and Disease Registry (ATSDR) to implement the health-related section of the Act.

The Superfund sites are those sites for which there has been historical release of hazardous substances into the environment. The RCRA sites, in contrast, are those sites that will be used and permitted by the federal government for the storage and, in some cases, disposal of hazardous substances.

1. Basic Elements of CERCLA

The federal Superfund program has five basic elements. The Act:

i) provides for the reporting of hazardous waste sites and releases or potential releases of hazardous substances;[4]

ii) establishes a means and a method[5] by which federal and state governments can clean up identified sites by creating a fund[6] to pay for the costs of clean-up;

iii) creates a mechanism through which the EPA can enforce the abatement of a release or threatened release of toxic substances;[7]

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[3] 42 U.S.C. ss. 9601-9657 (1982 and Supp. IV 1986).

[4] 42 U.S.C. s.9603 (1982). The person in charge of a facility must immediately report the release of any hazardous substance to the National Response Center. Failure to report a release is an offence under CERCLA. The reporting requirement is not applicable where the facility has a RCRA permit.

[5] 42 U.S.C. s.9604 (1982). Cleanup activities are governed by the National Contingency Plan (NCP). The NCP is the EPA's guide to discovering, prioritizing and then cleaning up hazardous sites. The sites which pose the greatest hazard to human health and welfare are placed on the National Priority List in accordance with the NCP. Under the NCP, the EPA may begin immediate removal of hazardous waste.

[6] 42 U.S.C. s.9631-9633 (1982). The federal Superfund is financed by a combination of appropriated general revenues, a tax imposed on the waste management industry, and a tax on crude oil and feedstock chemicals.

[7] 42 U.S.C. s.9606(a) (1982). To reimburse the Superfund for costs expended in cleanup and provide a means of direct action against responsible parties to force them to cleanup or pay for the cleanup of hazardous waste sites, CERCLA provides for abatement actions and actions to recoup response costs.

iv) authorizes the EPA to obtain reimbursement of expenditures that federal and state (and in some cases private persons) make in responding to leaks and cleaning up sites;[8] and

v) establishes a post closure liability trust fund designed to limit liability of operators of existing hazardous waste disposal sites when they close the site in accordance with the RCRA.[9]

The Act also authorizes ATSDR to conduct health assessments[10], develop toxicological profiles, provide emergency response, develop exposure and disease registries, and generally conduct research and disseminate information on Superfund sites.

2. Liability Under CERCLA

Liability under CERCLA is triggered by a release or threatened release of a hazardous substance into the environment which causes the government to incur expenses or "response costs" cleaning up the site. The Act defines "release" broadly as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment...."[11] The Act does define the term "threatened release".

CERCLA passes the costs of cleanup to the parties responsible for the waste site, adopting a broad approach to who is a responsible party under the Act. Under the common law, a vendor's liability for injury caused by a dangerous condition on the premises is finite; liability is limited to the time following the sale in which the buyer reasonably could be expected to discover and correct the hazardous condition.[12] CERCLA has radically changed this common law rule. Former owners who created the site may no longer escape liability by selling the asset.

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[8] 42 U.S.C. s.9607 (1982).

[9] 42 U.S.C. s.9641 (1982).

[10] Health assessments involve the evaluation of data and information on the release of hazardous substances into the environment in order to: assess any current or future impact on public health, develop health advisories or other health recommendations, and identify studies or actions needed to evaluate and mitigate or prevent human health effects.

[11] 42 U.S.C. s.9601(22) (1982).

[12] See: E.A. Glass, "The Modern Snake in the Grass: An Examination of Real Estate & Commercial Liability under Superfund & SARA and Suggested Guidelines for the Practitioner" (1987) 14 Environmental Affairs 381 at 422.

The current owner's obligation to clean up the site stems from the common law and is not changed by CERCLA. Property owners who presently hold title to the land may be liable, from a policy perspective, because they owe the public a duty to maintain the premises in a safe condition and free from a nuisance.

In constructing CERCLA, Congress clearly intended to meet the costs of clean-up with an expanded application of the "polluter pays" principle. To fully fund the cleanup bill, Congress intended to have the chemical industry, past and present, pay for the costs of cleaning up inactive hazardous waste sites. The Superfund itself is primarily funded by industry in the form of taxes on chemicals. Congress considered the imposition of liability for the effects of past disposal practices as a means "...to spread the costs of the cleanup on those who created and profited from the waste disposal - generators, transporters, and disposal site owners/operators."[13] In United States v. Price (Price III),[14] the court stated the legislative aims of CERCLA included "...goals such as cost-spreading and assurance that responsible parties bear their cost of the clean-up."

Liability under the Superfund program is imposed on four classes of persons:

i) the present owner or operator of the site;[15]

ii) any past owner or operator who owned or operated the site at the time that the hazardous substance was deposited on the site;[16]

iii) any person (generator) who arranged to have his own waste taken to site for disposal or treatment;[17] and

iv) any person who transported the hazardous substance to the site, if that person selected the site.[18]

Courts have responded favorably to this approach and have imposed liability retroactively to pre-CERCLA hazardous waste generators, transporters and landowners.[19] Moreover, courts have recently held such persons liable under CERCLA without regard to whether these persons were in compliance with the federal and state environmental laws or were using state of the art disposal methods at the time.[20]

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[13] See: J.S. Moskowitz and S.R. Hoyt, "Enforcement of CERCLA against Innocent Owners of Property" (June 1986) 19 Loyola of L.A. Law Review 1171 at 1172.

[14] 577 F. Supp. 1103 (D.N.J. 1983) at 1114.

[15] 42 U.S.C. s.9607(a)(1) (1982).

[16] 42 U.S.C. s.9607(a)(2) (1982).

[17] 42 U.S.C. s. 9607(a)(3) (1982).

[18] 42 U.S.C. s.9607(a)(4) (1982).

[19] Glass, Supra note x, at 390.

The Act effectively holds all past owners potentially liable under Superfund where they knew of the existence of the site.[21] However, truly innocent property owners are entitled under CERCLA to full reimbursement or indemnity from those responsible for the hazard. Under the Act, a person who, at the time of acquisition, "did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility,"[22] or who acquired it by inheritance or bequest[23], would not be liable. The burden of proving that one is an innocent landowner is on the landowner.

Recent amendments to CERCLA codify a distinction between innocent landowners and sophisticated investors. In determining the landowner's relative innocence "the court shall take into account any specialized knowledge or experience on the part of the defendant,... and the ability to detect... contamination by appropriate inspection."[24] Accordingly a sophisticated investor who knows or has reason (by virtue of sophistication) to know that the site contains hazardous waste will be held liable for response costs.[25]

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[20] Ibid., referring to United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984) (conduct which was unlawful or even permitted by state can still be subject of CERCLA liability); United States v. South Carolina Recycling & Disposal Inc., 20 Env't Rep. Cas. (BNA) 1753 (D.S.C. 1984) (traditional defense of government approval, state of the art technology and compliance with state law not a defense under CERCLA).

[21] Intervening owners (past owner who did not create the site) may be held liable where they knew of the hazardous condition of the site: 42 U.S.C. s.9601(35)(C) (1986).

[22] 42 U.S.C. s.9601(35)(A)(ii).

[23] 42 U.S.C. s.9601(35)(A)(iii).

[24] SARA s.101(f), Pub. L. No. 99-499, 1986 Code Cong. & Admin. News (100 Stat.) 1616-17, 1616, codified at 42 U.S.C. s.9601(35)(B).

[25] United States v. Price, 523 F. Supp. 1055 (D.N.J. 1981). The court's decision was influenced by a number of factors: (1) the purchase price paid for the property reflected the fact that the property had been previously used as a landfill; (2) the purchaser was a real estate developer and not a private individual purchasing property to build his own residence. At page 1073 the court stated: "As sophisticated investors, the purchaser therefore had a duty to investigate the actual conditions that existed on the property or take it as it was."; and (3) after learning of the dangerous condition, the purchaser left the site unattended. As owners of the site they failed to abate the hazardous conditions

In addition to innocent property owners, CERCLA exempts from liability: lenders or persons who have some aspects of ownership primarily to protect a security interest[26]; transporters if they were not responsible for selecting the site; municipalities that acquire title to contaminated property involuntarily, for example, through abandonment or tax delinquency; Indian tribes; and cleanup contractors (unless they negligently or intentionally contribute to the release of the hazardous substance).

A landowner would also be entitled to full reimbursement of cleanup costs from those responsible where the hazardous condition of the site is the result of contaminants migrating from adjoining lands.

CERCLA does not assess liability based on culpability or fault[27], but based upon the relationship of the defendant with the land. Consequently, all that need be shown is that the landowner currently owns the site or that the site was owned at the time of disposal. Just as present owners may be held liable for contamination that occurred prior to their tenure on the land, similarly tenants may be liable for hazardous waste deposited on the land before the lease commenced. [28]

Moreover, rules of causation have been dramatically relaxed. For example, the government is not required to "fingerprint" the waste; a generator will be found liable regardless of whether the hazardous substance that it disposed of at the site in question is the actual cause of the current problem.

The courts have construed CERCLA to impose joint and several liability between those responsible under the Act, with the result that a party that contributed a minor portion of the hazardous substances may, under certain circumstances, be subject to liability

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on their premises. In this sense they contributed to the total dangerous and toxic condition of the site.

[26] Lenders that exercise some control of a site, even where this is consistent with ordinary lending practices may however find themselves liable under CERCLA. See in this regard: Glass, Supra note x, at 418-419.

[27] The only exception to this imposition of "strict" liability (in Canada, we would refer to this type of liability as "absolute" liability, that is without regard to culpability, negligence, or fault) include: an act of God, an act of war, and an act of an unrelated third party with whom the defendant has no contractual relationship. See: 42 U.S.C. s.9607(b) (1982).

[28] As tenant in possession, the lessee may be held liable under CERCLA as an owner or operator: 42 U.S.C. s.9607(a)(2) (1982).

for the entire cleanup costs. Recent amendments to CERCLA encourages the EPA to "cash out" *de minimis* contributors[29] as soon as possible in any Superfund settlement proceedings. To be eligible, a *de minimis* settlement would have to cover only a minor portion of the response costs at a particular site. Any *de minimis* agreement must provide contribution protection for a settling party against parties who do not settle for matters addressed in the settlement, and may release a party from future liability unless such a release would be inconsistent with the public interest.

3. The Assessment and Remediation Process

CERCLA establishes a five part process for approving Superfund actions:

i) a study of the sources and impacts of the contamination on public health and the environment (*remedial investigation*);
ii) a study of the remedial technology and feasible alternatives (*feasibility study*);
iii) a decision and plan for cleanup (*remedial action plan/record of decision*);
iv) an agreement or order for undertaking or financing the cleanup, similar to a permit for conventional projects (*consent decree or enforcement order*); and
v) carrying out the plan and approving its completion (*remedial action implementation/monitoring and contingency plan/certificate of completion*).

In order to do a voluntary cleanup, CERCLA essentially forces the parties into a lawsuit in order to "settle" the lawsuit with a "settlement agreement" or "consent decree", which describes the cleanup plan and any covenant not to sue.

A number of provisions in CERCLA are specifically designed to facilitate the prompt cleanup of hazardous sites. EPA or a state agency may contribute public funds to expedite or enhance a voluntary cleanup. For example, it may pay the share of insolvent parties. The EPA may also enter into early agreements with minor contributors of wastes to a contaminated site. These de minimis contributors are protected from contribution suits by parties who do not settle. As well, the EPA or the state agency may agree not to seek additional money or action from parties who voluntarily clean up a site. Under CERCLA the government is required to give a covenant not to sue if the hazardous wastes at a site have been removed or made harmless and cleanup has been certified complete.

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[29] *De minimis* contributors include those who contributed approximately 1% or less of the low-toxic waste at the site in question.

4. Clean-up Standards

Under CERCLA, cleanups must meet the following standards: (1) protect human health and the environment; (2) be cost effective; (3) meet all "applicable or relevant and appropriate" federal and state standards; and (4) where possible, create a permanent solution to the contamination.

5. Enforcement

Willful or unjustified violations of a cleanup order may result in liability for up to three times the amount of the cleanup costs incurred by the government. In addition, any violation of an order or requirement can lead to substantial civil penalties.

Under CERCLA, failure to report certain releases of hazardous substances is a criminal action punishable by fine or imprisonment.

When the federal government pays for a cleanup action, it may impose a lien on the contaminated property for expenses incurred.

The United States: State "Superfund" Laws

Many states now have independent authority to initiate hazardous waste cleanups and add to the liability imposed by the federal Superfund law. New Jersey and New York have developed a number of mechanisms to deal with hazardous waste contamination problems. In 1987 both Oregon and Washington enacted new state Superfund states.

All State "Superfund" laws create extensive liability for the cleanup of hazardous substances. Each imposes liability without regard to fault against a variety of persons. Generally speaking, all of the Superfund laws use a five part process for approving Superfund actions. Under all Acts, failure to comply with a cleanup order may have severe consequences. A comparison of federal and state Superfund laws can be found in Table D.1.

1. The New Jersey Example

The New Jersey Spill Compensation and Control Act was created in 1977 and provided the authority to remediate hazardous waste discharges under emergency conditions and on a long term basis, in those cases where responsible parties are not identified. The statute also allows the state to pursue treble damages against non-settling parties.

In addition, New Jersey has also enacted the Environmental Cleanup Responsibility Act(ECRA)[30] in 1983. The ECRA program was initiated in response to the fact that abandoned properties with serious contamination within the state were often economically undevelopable and required state and federal tax dollars to pay for remediation of the site before private capital would be invested. ECRA attempts to place cleanup responsibility on those industrial establishments responsible for creating the problem by making them responsible for resolving the problems prior to someone new purchasing the property. The costs of remediation are now born by the owner of the industrial establishment and future problems at increased costs will be avoided.

ECRA imposes pre-conditions on the sale, transfer or closure of industrial facilities generating, manufacturing, refining, transporting, treating, storing or disposing hazardous wastes. Within 60 days of an announcement of intention to sell or close, the company has to submit to the state government, for its approval, either a negative declaration (stating that there are no hazardous substances or contamination on the site) or a cleanup plan (to accomplish the removal of hazardous substances or contamination).[31]

The ECRA establishes a number of processes. Where the company files an application, an inspection is carried out, the site is either certified as "clean" through the approval of the negative declaration[32], or existing environmental problems are documented and the site is monitored until the cleanup is complete. The Act also provides for Administrative Consent Orders[33], which permit a transaction to proceed where the site is contaminated but the buyer and seller agree as to who is responsible for the cleanup and the necessary financial assurances are set aside. Remediation of a site may be deferred under the ECRA where the use of the site by the new owner is certified to be substantially the same.[34] The state government may also issue a Letter of Non-applicability, an official determination from the ECRA that a particular transaction or company does not come under ECRA's authority.

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[30] N.J.S.A. 13:1K-6 et seq. (P.L. 1983, c. 330).

[31] ECRA, s. 4(a)&(b).

[32] ECRA, s. 5(b).

[33] ECRA, s.4(c).

[34] ECRA, s.6(b). It should be noted that the authority to defer remediation under ECRA does not absolve the owner from potential cleanup liability under other state or federal statutes.

2. Other Restrictive Transfer Programs

Property cleanup laws such as that in New Jersey lead to systematic identification of toxic contamination when industrial or commercial property is about to change uses or change hands. Restrictions on transfers of such land motivate buyers and sellers to cleanup contamination as quickly as possible. A number of other jurisdictions in the United States have followed the lead of New Jersey in this regard.

The state of Connecticut has a transfer program similar to that of New Jersey, although its application is more limited.[35] Covered facilities must either generate at least 100 kilograms of hazardous waste per month or handle the hazardous waste generated by others. In addition it only applies to facilities operating after October 1, 1985.

An ordinance adopted by the City and County of San Francisco applies similar requirements to firms seeking building permits for construction in geographic areas that have a history of industrial land use or are landfills of unknown origin. State and federal agencies are relied on to review site investigations and prescribe remediation plans. These agencies are also expected to certify or verify the satisfactory completion of the site remediation plan.[36]

Canada: The Ontario Approach to Managing Contaminated Sites

In January 1989 the Ontario Ministry of Environment introduced "Guidelines for the Decommissioning and Clean-up of Sites in Ontario". The guidelines apply to all provincially, municipally and privately owned sites and facilities to be closed down at which environmental contamination may have taken place. The guidelines may also be used where remedial action is necessary to clean-up a site but where the decommissioning of facilities is not being undertaken or is complete, such as remedial actions taken with respect to contaminants at coal gasification and other historically contaminated sites.

The Ministry of Environment relies primarily on the provincial Environmental Protection Act, R.S.O. 1980, c.141 to provide the legislative basis to decommissioning and site clean up.[37] As a matter of policy, the Ministry relies on its authority under the Act to issue orders to enforce the decommissioning and clean up process when proponents are unwilling to meet the Ministry's decommissioning or site clean up objectives or time frames.

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[35] See: The San Francisco Foundation, "Industrial and Commercial Property Cleanup Ordinances" (A Project of the Local Government Commission, Sacramento, California, August 1987) at 3.

[36] The City chose not to certify site mitigation because of a lack of resources and concern about exposure to liability. See: Ibid., at 3.

1. General Provisions Supporting Contaminated Site Remediation

The Ontario legislation contains a number of general provisions that support the current contaminated sites management regime in the province, as well as provisions specific to waste management in the province.

Sections 5 and 13 are the general anti-pollution provisions of the Ontario Environmental Protection Act. Section 5 prohibits the discharge[38] into the natural environment of any contaminant in excess of amounts prescribed by regulation. Section 13 of the Act prohibits a person from discharging a contaminant, or causing or permitting the discharge of a contaminant, into the natural environment that causes or is likely to cause an adverse effect.

"Discharge", when used as a verb, includes add, deposit, leak, emit and, when used as a noun, includes addition, deposit, emission or leak.[39] A "contaminant" is defined by the Act to mean any solid, liquid, gas, odor, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities that may cause an adverse effect. "Adverse effect" is defined in section 1 of the Act to include: "(i) impairment of the quality of the natural environment for any use that can be made of it, (ii) injury or damage to property or to plant or animal life, ... (vi) rendering any property or plant or animal life unfit for use by man, (vii) loss of enjoyment of normal use of property, and (viii) interference with the normal conduct of business."

Sections 12 and 14 of the Act imposes duties to notify the Ministry "forthwith" when contamination exceeds permitted levels, or where a discharge occurs "out of the normal course of events that causes or is likely to cause an adverse effect."

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[37] Projects and plans subject to the Ontario Environmental Assessment Act must address decommissioning as part of the environmental assessment process.

[38] The prohibition in section 5 extends to all persons responsible for a source of contamination. "Person responsible" means the owner, or the person in occupation or having charge, management or control of a source of contaminant.

[39] Ontario EPA, s. 1(1)(ca).

Section 6 of the Act provides the authority to issue an order to "control" the discharge of a contaminant when it exceeds permitted effects or may cause an adverse effect. Under section 16, the Minister may order any person who "causes or permits" the discharge of a contaminant to "take all steps necessary to repair the injury or damage; in this instance the discharge must injure or damage the environment before an order to repair is available.

Section 17 of the Act gives the Director broad discretion in terms of the range of preventive measures that may be ordered to prevent or ameliorate the discharge of a contaminant, and is often relied on to effect contaminated sites remediation. The section authorizes the Director to order preventive measures where he is of the opinion "upon reasonable and probable grounds" that the nature of an undertaking or of anything on or in a property is such that, if the contaminant is discharged into the natural environment, there will be an adverse effect. The persons to whom an order can be issued under this section are those who "own" or "have management or control of an undertaking or property".

2. Provisions Specific to Waste Management

The Act also contains a number of provisions specific to the management of wastes. Under section 39 of the Act the deposit of "waste" on any land or building that is not an approved "waste disposal site" is prohibited.

"Waste" and "waste disposal site" are both given broad definitions in section 24 of the Act. "Waste" includes ashes, garbage, refuse, domestic waste, industrial waste, or municipal waste and such other wastes as are designated in the regulations.[40] "Waste disposal site" means any land or land covered by water upon, into, in or through which, or building or structure in which, waste is deposited or processed and any machinery or equipment or operation required for the treatment or disposal of waste.[41] Both on-site and off-disposal activities are covered by this definition.

Section 40 of the Act prohibits the "use" of any facility or equipment for any aspect of waste management for which a "waste management system"[42] certificate of approval has not been issued.

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[40] Ontario Regulation 309 designates without exemption the following as wastes: hauled industrial wastes, hazardous waste, incinerator waste, processed organic waste.

[41] Waste disposal sites are classified under section 4 of Ontario Regulation 309 to include: compost sites, dumps, grinding sites, incineration sites, landfilling sites, and organic soil conditioning sites.

[42] A waste management system is defined by the Act to mean all facilities, equipment

The Ministry relies on two sections of the Act to provide the authority to effect remediation of waste disposal sites. Section 41 of the Act provides Ministry officials with the power to order removal of waste:

> "Where waste has been deposited upon, in, into or through any land or land covered by water or in any building that has not been approved as a waste disposal site, the Director may order the *occupant or the person having charge and control* of such land or building to remove the waste and to restore the site to a conditions satisfactory to the Director."

Section 45 places restrictions on the use of former waste disposal sites, providing that:

> "No use shall be made of land or land covered by water which has been used for the disposal of waste within a period of twenty-five years from the year in which such land ceased to be so used unless the approval of the Minister for the proposed use has been given."

3. Civil Liability for Failure to Comply with an Order

Section 143 of the Act permits the Minister to recover the cost of carrying out a Minister's or Director's order under the Act in default of it being complied with by the person receiving the order.

4. Provisions Respecting Spills of Contaminants

In 1985 the province of Ontario implemented Part IX of the Environmental Protection Act, R.S.O. 1980, c.141, as amended, commonly referred to as the "Spills Bill". The Spills Bill dramatically restructures the rules of liability and compensation in environmental matters, breaking new legal ground in Canada. This statutory departure to the traditional common law approach to imposing civil liability reflects an emerging trend within North America towards extending liability for clean up.

The Ontario Environmental Protection Act imposes a number of statutory duties and creates extensive liability in the event of a spill. The owner or person having control of the spilled pollutant is under a duty to report the spill to local and provincial officials[43]; where the spilled pollutant causes or is likely to cause an adverse effect, the

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and operations for the complete management of waste, including the collection, handling, transportation, storage, processing and disposal thereof, and may include one or more waste disposal sites.

owner or person having control is under a duty to do "everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment."[44]

Where an owner or controller fails to discharge their duty to act in the event of a spill, the Minister can order owners or controllers of the spilled pollutant to take specific action[45], or can order his staff to do so, and sue to recover the costs[46]. Section 87 of the Act imposes absolute liability on owners and controllers of a spilled pollutant in respect of the costs and expenses incurred by the government and other persons in these circumstances. The owner/controller is also absolutely liable to the government or any other person for loss or damage that is a *direct result of neglect or default of the owner/controller in carrying out a duty imposed or an order or direction made* under Part IX.[47]

The Act also imposes strict liability on owners and controllers for "loss and damage incurred as a direct result" of a spill.[48] Here liability attaches unless the owner/controller can establish that he took all reasonable steps to prevent the spill, or that the spill was caused by an act of God, or an act of war, or "intentional independent third party intervention."[49] Under the Act, recoverable "loss and damage" is broadly defined to include personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income.[50]

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[43] Ontario EPA, s. 80.

[44] Ontario EPA, s. 81.

[45] Ontario EPA, s. 85.

[46] Ontario EPA, ss. 82 and 87.

[47] For example, if the owner/controller fails to take immediate remedial action as is his duty under section 81 of the Act, he will be absolutely liable to government or to any other person for directly resulting damage.

[48] Ontario EPA, s. 87(2)(a). It should be noted that a plaintiff can recover damages that are the *direct result of the spill*. This would seem to replace the rule that damages are limited to those that were reasonably foreseeable. See: Calvin Sandborn, "The Polluter Pay Principle Hits Adolescence: Statutory Trends in the Liability to Compensate" in "Environmental Liability and Hazardous Waste Management " Materials prepared for a Continuing Legal Education Seminar held in Vancouver, B.C. on April 28, 1989.

[49] Ontario EPA, s. 87(3).

[50] Ontario EPA, s. 87(1).

5. Offences and Penalties

The Ontario legislation provides four broad categories of offences with a different penalty structure for each. For individuals, fines for a first offence range from $5,000 for a technical offence where there is no pollution[51], to a maximum of $10,000[52] plus one year in jail for an offence respecting hazardous waste or hauled liquid industrial waste causing actual damage. Fines imposed on corporations for these same offences are substantially higher.[53]

The Act also provides for a number of court orders regarding the prohibition of repetition of the offence[54], or regarding the protection or restoration of the natural environment.[55]

Canada: The Quebec Approach to Managing Contaminated Sites

On February 1988 the Province of Quebec announced a "Contaminated Sites Rehabilitation Policy" to deal with the problem of contaminated sites in the province. The policy is designed to allow the recovery of former industrial sites with a view to ensuring that the quality of the soil is compatible with the proposed use to which the land is to be put. Perhaps of greatest interest in terms of process is the fact that the Ministry of Environment relies on local government to identify contaminated sites and make referrals to provincial authorities.

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[51] Ontario EPA, ss. 146 and 147 set out the four categories of offences and penalties.

[52] Ontario EPA, s. 147 provides for a minimum fine in these cases of $2,000.

[53] For instance, for an offence respecting hazardous waste or hauled liquid industrial waste causing pollution a corporation may be liable to a minimum fine of $2,000 and a maximum fine of $250,000 for a first offence. By contrast the maximum fine for an individual is $10,000. Fines generally double if it is a repeat offence.

[54] Ontario EPA, s. 144(2).

[55] Ontario EPA, s. 146d.

Europe: The Netherland's Legislative Approach

1. Scope of Liability

In January 1987 the Soil Protection Act came into force, providing the legal basis for an integrated approach to protection of soil quality.

The Act provides the authority to order the "person with rights to the property on which the source of contamination is situated to eliminate that source or to restrict the contamination or its effects as far as possible."[56] Property owners are entitled to indemnification for costs incurred in certain circumstances:

> "If a person in receipt of an order... is a person with rights to the property in respect of which such an order has been issued, is likely to suffer financial loss or damage, which he cannot reasonably be expected to bear either wholly or in part, the provincial authority or the Minister shall ... grant him indemnification to be fixed equitably, insofar as reasonable indemnification has not or cannot be provided by other means."[57]

Liability is based on ability to pay, not on the activities of the owner/operator unless the person has unfairly profited from such contamination. In these instances the various levels of government may be required to contribute to the costs of clean up. The Act also provides for recovery of costs of remediation:

> "If a contribution has been made under this Act to a province or municipality in respect of the cost of preparing or implementing remedial measures, Our Minister may retrieve any costs incurred by the State ... subject to any reduction imposed by the courts, *from the person whose unlawful act caused the soil contamination* in question."[58]

The Act also imposes a general duty to take reasonable measures to mitigate and remedy impairment on persons "performing acts on or in the soil."

2. Assessment and Remediation Process

The Act requires provincial authorities to draw up a clean-up program to deal with soil contamination in consultation with municipalities each year.[59] The plan identifies sites where there is soil contamination and outlines a remedial action plan. Provincial authorities are required to make the draft program available for public consultation[60]; the public is entitled to make "reasoned objection to the programme in writing".[61] Under the Act the public has one month in which to lodge an objection to the program.[62]

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[56] Soil Clean-Up Act, s. 12(1).

[57] Soil Clean-Up Act, s. 17(1).

[58] Soil Clean-Up Act, s. 21(10.

[59] Soil Clean-Up Act, s. 2(1).

The final clean-up program must state the basis for decisions respecting sites selected for clean-up and must address public objections received.[63] Provincial authorities are required to submit the final program to the Minister for approval.[64] The Minister has the authority under the Act to determine which of the cases indicated in the program are to be considered for remedial measures or investigations.[65]

Provincial authorities take the lead role in the remediation of contaminated sites, however, they are required by the Act to consult with the municipal authority concerned on the implementation of a clean-up program required for a specific case. Moreover, the municipal authority may "...request the provincial authority to delegate to it the implementation of a clean-up program in respect of cases that fall within its territorial boundaries."[66] Where the provincial authority delegates the implementation of a clean-up program to a municipality, the municipality has the authority to issue orders respecting access to sites and remediation.[67]

Where the current property owner is entitled to indemnification under the Act for costs respecting clean-up of a site, the Act sets out the formula for financial contribution by various levels of government.[68]

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[60] Soil Clean-Up Act, s.5(1).

[61] Soil Clean-Up Act, s. 5(4).

[62] Soil Clean-Up Act, s.5(3).

[63] Soil Clean-Up Act, s.6(1).

[64] Soil Clean-Up Act, s. 6(2).

[65] Soil Clean-Up Act, s.7(1). Where the decision of the Minister differs from the recommendations in the program, the Minister must state the reasons for his decisions.

[66] Soil Clean-Up Act, s.10(2).

[67] Soil Clean-Up Act, s.11(5).

[68] Soil Clean-Up Act, s. 18 to 21.

Summary Observations: Trends in Other Jurisdictions

1. Cooperation Between Levels of Government

In each of the jurisdictions examined the approach to managing contaminated sites emphasized cooperation between levels of government. In the United States, federal legislation permits state agencies to take the lead role in assessing and remediating the site. The Netherlands legislation also permits a municipality to petition for the lead role in the process. Perhaps even more significant, the Netherlands approach also makes the development of remediation plans contingent on consultation between the levels of government.

In Canada, cooperation between levels of government is a matter of policy as opposed to legislative requirement. This policy is perhaps best articulated in Quebec where the role of local governments and the provincial agency are clearly laid out in policy.

2. Primary Emphasis on Remediation

In many jurisdictions program objectives emphasis remediation first and assignment of costs second. This is evident in the approaches of the United States and the Netherlands. In each case the lead agency has the authority to intervene and ensure remediation of a site where the responsible person refuses to do so. This approach is also evident in Ontario.

3. Changes to the Rules of Liability

The United States Superfund laws are prime examples of how traditional liability and compensation rules are changing in environmental matters. The federal Superfund law has retroactive effect, and dramatically does away with a number of common law principles of liability.[69] Moreover, parties have been found liable for hazardous materials that were not known to be hazardous at the time that the parties dealt with them.

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[69] CERCLA does away with such rules as the common law nuisance principle that an owner is not responsible for nuisances unless she had knowledge or means of knowledge of the nuisance. Under CERCLA, proof of ownership of the site at the relevant time is sufficient to establish liability.

Closer to home, the Ontario "Spills Bill" dramatically restructured the rules of liability and compensation in situations involving spills. The Act establishes absolute liability for the cost of cleaning up a spill, doing away with common law principles in this area - negligence is no longer a critical factor under the Act in this respect.